No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPENDICES TO JURISDICTIONAL STATEMENT

ROBERT D. PAPKIN
Counsel of Record, Member of the Bar of the Supreme Court of the United States

EDWARD W. SAUER
SQUIRE, SANDERS & DEMPSEY
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: (202) 626-6601

Counsel for Appellants Lineas Aereas Costarricenses, S.A., et al.

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APPENDIX A

SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
Appellant/Cross Appellee

v.

LINEAS AEREAS COSTARRICENSES, *et al.*,
Appellees/Cross Appellants

No. 63,989 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, J.

We have before us an appeal here by an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction pursuant to article V, section 3(b)(5), Florida Constitution.

This case arose when Lineas Aereas Costarricenses (hereinafter LACSA) filed a complaint in circuit court in Leon County seeking to enjoin Florida's Department of Revenue from collecting sales taxes, under a provision of chapter 83-3, Laws of Florida, on aviation fuel purchased by LACSA for use in foreign commerce. Transportes Aereos Nacionales, S.A., Aerolineas Argentinas, Aeronaves de Mexico, S.A., Aerovias Nacionales de Columbia, [sic] S.A., Trinidad and Tobago (BWIA International) Airways Corp., Empresa Ecuatoriana de Aviacion, S.A., Linea Aerea Nacional Chile, Compania Mexi-

cana de Aviacion, S.A. de C.V., Viacao Aerea Rio-Grandense, and Venzolana Internacional de Aviacion, S.A. were granted leave to intervene as party plaintiffs.

The circuit court entered an order of final judgment upholding the tax as constitutional but granting the injunction on the basis that the foreign airlines were exempt under certain international agreements. The Department of Revenue is appealing the exemption and LACSA is cross-appealing the determination that the tax is constitutional.

Inasmuch as the issues raised here have been addressed by us in *Delta Air Lines, Inc. v. Department of Revenue*, No. 63,915 (Fla. June 14, 1984); *Department of Revenue v. Wardair Canada Ltd.*, No. 64,036 (Fla. June 14, 1984); and *Department of Revenue v. Air Jamaica Ltd.*, No. 64,035 (Fla. June 14, 1984), they will not be re-addressed.

Accordingly, we affirm the circuit court's order to the extent that it upheld the tax as constitutional with the exception of the portion regarding the corporate tax credit to Florida-based airlines. In *Delta* we determined that portion to be unconstitutional and ordered it stricken from chapter 83-3. We reverse the circuit court's order to the extent that it recognized an exemption from the excise tax for the foreign airlines.

It is so ordered.

ALDERMAN, C.J., BOYD and SHAW, JJ., Concur.

OVERTON, J., Dissents: "I dissent. *See Department of Revenue v. Wardair Canada Ltd.*, No. 64,036 (Fla. June 14, 1984)."

McDONALD, J., Dissents.

APPENDIX B

SUPREME COURT OF FLORIDA

NORTHEASTERN INTERNATIONAL AIRWAYS, INC., *et al.*,
Appellants

v.

DEPARTMENT OF REVENUE,
Appellee

No. 64,085 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, J.

We have before us an appeal which results from an order by the Fourth District Court of Appeals certifying the issues involved to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

The case arose with the filing of a complaint in circuit court in Broward County. Northeastern International Airways, Inc., and Arrow Air, Inc., challenged the constitutionality of chapter 83-3, Laws of Florida. The circuit court entered an order of final judgment upholding the constitutionality of chapter 83-3. The plaintiffs challenged the constitutionality of chapter 83-3 but did not argue for exemption on the basis of international agreements entered into by the United States. The circuit court granted a motion for summary judgment against the plaintiffs thereby upholding the constitutionality of the law.

We have dealt with the issues raised here in our decisions in *Eastern Air Lines, Inc. v. Department of Reve-*

nue, No. 63,949 (Fla. June 14, 1984); *Delta Air Lines, Inc. v. Department of Revenue*, No. 63,915 (Fla. June 14, 1984); *Department of Revenue v. Wardair Canada Ltd.*, No. 64,036 (Fla. June 14, 1984); and *Department of Revenue v. Air Jamaica Ltd.*, No. 64,035 (Fla. June 14, 1984).

Accordingly we affirm in part and reverse in part the order of the circuit court. We determined in *Delta* that the portion of chapter 83-3 which provided a tax credit to Florida-based airlines was unconstitutional. We also determined that it was severable and that it was stricken from the law. The remainder of the order is affirmed.

It is so ordered.

ALDERMAN, C.J., BOYD, OVERTON and SHAW, JJ., Concur.

McDONALD, J., Dissents.

SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
Appellant

v.

AIR JAMAICA LTD., *et al.*,
Appellees

Reported at:
455 So.2d 324 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

This case is before us on an order from the First District Court of Appeal which certified the issues in this case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint in circuit court in Leon County by the respondent Air Jamaica challenging the constitutionality of chapter 83-3, Laws of Florida. By order of the trial court the complaint was amended to include eleven other foreign airlines. The action was consolidated with a case filed by Wardair Canada for the purpose of trial. The parties stipulated to a briefing schedule and an early hearing date was obtained. A procedure was allowed which allowed the airlines to self-accrue the sales tax imposed under chapter 83-3 during the pendency of the proceedings subject to certain conditions.

The circuit court entered an order of final judgment on July 19, 1983, upholding the constitutionality of chapter 83-3 but ruling in favor of the airlines' assertion that

they should be exempt from the tax by virtue of certain executive agreements between their countries and the United States. The trial judge had previously upheld the law in *Delta Air Lines, Inc. v. Department of Revenue*, No. 83-761 (Leon County Cir.Ct.—Civ.Div. May 23, 1983).

The Department of Revenue appealed the circuit court's holding recognizing an exemption for the foreign airlines. The airlines cross-appealed. We will discuss only those issues raised which have not been previously determined by this Court in either *Eastern Air Lines Inc. v. Department of Revenue*, 455 So.2d 311 (Fla. 1984); *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984); or *Department of Revenue v. Wardair Canada, Ltd.*, 455 So.2d 326 (Fla. 1984).

The airlines challenge the law on the basis it unconstitutionally invades the exclusive powers of the executive and legislative branches to regulate foreign commerce by taxing commerce through a prohibited impost on exports. The airlines did not raise this issue in their pleadings or at oral argument in the circuit court. The department argues that the airlines are therefore precluded from raising the issue now. We agree. Nonetheless, we find that the law is not prohibited by the export-import clause of the federal constitution. The airlines attempt to apply federal statutes which are inapplicable to the excise tax in question. There is no basis for the airlines' conclusion that the tax violates the export-import clause. The airlines attempt unsuccessfully to distinguish the case of *Shell Oil Company v. State Board of Equalization*, 64 Cal.2d 713, 414 P.2d 820, 51 Cal. Rptr. 524 (1966); *appeal dismissed*, 386 U.S. 211, 87 S.Ct. 973, 17 L.Ed.2d 870 (1967). *Shell* indicates, without question, that the fuel at issue here is not an export because it is used to propel that aircraft and is not delivered to another country. Furthermore, the tax in question is imposed on the privilege of the Florida vendor selling motor fuel or spe-

cial fuel with the legal incident being on the first use or withdrawal from storage for use in the State of Florida. Florida is not attempting to tax the *instrument*, that is, the aircraft, of the foreign national while in Florida nor is it attempting to tax the process of exportation nor any fuel *for export*.

The airlines can also find no support for their position in *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156, 91 L.Ed. 80 (1946). That case involved the shipment of oil from this country "with the intention of uniting them to the mass of those belonging to some foreign country." *Id.* 414 P.2d at 824, 51 Cal. Rtpr. at 528. The oil was specifically sold for shipment abroad. At the time the tax was levied, the oil had clearly entered the process of exportation. This is not true of the present tax. The fuel is intended to be *used* by the airlines. It is not being purchased by the airline with the intent to transport it for sale abroad. We find no merit to the airlines' argument on this point.

The airlines have raised the argument that the tax is a direct violation of agreements between the United States and their respective countries. We faced a similar challenge to the law in our decision in *Department of Revenue v. Wardair Canada, Ltd.*, 455 So.2d 326 (Fla. 1984). In the present case the airlines have not produced any facts which would enable us to hold contrary to our holding in *Wardair* where we found that the tax did not violate any international agreement. In addition, we find that none of the agreements expressly grant a most favored nation status when dealing with the issue of fuel and taxes as the airlines contend.

Accordingly, we affirm the order of the circuit court as to the constitutionality of chapter 83-3 except that portion of the law pertaining to a tax credit for Florida corporations. In *Delta* we determined that portion to be unconstitutional and it was stricken from the law. We reverse

the circuit court to the extent that it recognized an exemption for foreign airlines.

It is so ordered.

ALDERMAN, C.J., and BOYD and SHAW, JJ., concur.

OVERTON, J., dissenting:

I dissent. *See Department of Revenue v. Wardair Canada Ltd.* [455 So.2d 326], (Fla. 1984).

McDONALD, J., dissents.

SUPREME COURT OF FLORIDA

EASTERN AIR LINES, INC.,
Appellant

v.

DEPARTMENT OF REVENUE,
Appellee

Reported at:

455 So.2d 311 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

The case is before us on an order from the First District Court of Appeal certifying the issues in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Eastern Air Lines in the circuit court of Leon county seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the grounds that the law was unconstitutional. Specifically, Eastern alleged that the law violated the equal protection and due process clauses of the Florida and United States Constitutions, was an unconstitutional delegation of legislative authority, and violated the commerce clause of the United States Constitution. By stipulation, the parties agreed to a procedure whereby Eastern was allowed to self-accrue the sales tax imposed under chapter 83-3, which became effective on April 1, 1983, during the pend-

ency of the proceedings subject to certain conditions. The trial judge entered his final judgment in this case on May 27, 1983, incorporating the order he had entered in a similar action filed by Delta Airlines and upholding the constitutionality of chapter 83-3. On June 24, 1983, Eastern filed its notice of appeal with the First District Court of Appeal. On July 12, 1983, that court issued its order certifying the case for immediate resolution by this Court.

Chapter 83-3 was enacted during a special session of the Florida legislature which was called for the express purpose of addressing road transportation and public transit needs in the state. The law revises the tax structure of chapters 212 and 220 of the Florida Statutes. The new law eliminates one-half (4 cents) of the excise tax imposed by former chapter 206, Florida Statutes (1981), on fuel purchased for road transportation use and imposes a five percent sales tax on this fuel through the new Part II of former chapter 212, chapter 83-3, section 6. That section bases the five percent sales tax on a predetermined price for fuel of $1.148 per gallon. The new sales tax is imposed on all aviation jet fuel purchased by interstate air common carriers, but is not imposed on railroads and vessels due to the proration provision which applies to railroads and vessels allowing taxation based on cost and only on the carrier's intrastate mileage. Ch. 83-3, § 5 (amends § 212.08(4), Fla.Stat. (Supp. 1982)). Section 5 of the law provides:

> (4) EXEMPTIONS, ITEMS BEARING OTHER EXCISE TAXES, ETC.—Also exempt are water (not exempting mineral water or carbonated water), and; all fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, except that fuel expressly exempt herein. Motor fuels and special fuels are taxable as provided in part II,

except that those used by vehicles, other than aircraft, which are licensed as common carriers by the Interstate Commerce Commission to transport persons or property in interstate or foreign commerce and vessels used to transport persons or property in interstate or foreign commerce are taxable only to the extent provided herein.

The first issue which we will address is Eastern's contention that the proration provisions, which do not apply to airlines, violate concepts of equal protection by not treating all common carriers alike. Eastern asserts that all interstate carriers, whether they be airlines, railroads, trucks or vessels, are similarly situated for fuel tax purposes. The circuit court found that Eastern did not sustain its burden of demonstrating that the classification is hostile and oppressive and held that there "is no invidious discrimination by the creation of an arbitrary classification." The court's order states: "Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature." The court cited the example of the airlines being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to chapter 80-368, Laws of Florida, while vessels and railroads are not. The court also noted that proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and the Atlantic Ocean to avoid the accumulation of intrastate mileage.

When the state legislature, acting within the scope of its authority, undertakes to exert the taxing power, every presumption in favor of the validity of its action is indulged. Only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. *Walters v. City of St. Louis*, 347 U.S. 231, 74 S.Ct. 505, 98 L.Ed. 660 (1954). In the field of taxation particu-

larly, the legislature possesses great freedom in classification. The burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it. *Madden v. Kentucky*, 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590 (1940); *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229, 323 (Fla. 1968). The state must, of course, proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. *Department of Revenue v. AMREP Corp.*, 358 So.2d 1343, 1349 (Fla. 1978). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores v. Bowers*, 358 U.S. 522, 79 S.Ct. 437, 3 L.Ed.2d 321 (1959).

We agree with the circuit court's conclusion that Eastern has not met its burden in attacking the classification made here. They have failed to demonstrate that a hostile and oppressive discrimination has been made. There are many obvious distinctions between public road and highway transportation of persons and property and air transportation upon which the classification at issue could rationally be based. The modes of transportation are inherently and essentially different. The classification drawn does not violate concepts of equal protection.

Eastern also argues that the statute, by adopting an initially established fuel price of $1.148 per gallon upon which to base the tax rate, violates concepts of equal protection and unconstitutionally restricts the rights of individuals to contract. The provision being challenged reads as follows:

> § 212.70 Tax imposed on sale of motor fuel and special fuel; tax upon ultimate consumer; determination by department; notification.—
>
> (3) Prior to June 1 of each year, the department shall determine the appropriate sales tax applicable to the retail price per gallon of motor fuel and special fuel as follows:

(a) The department shall determine the appropriate total motor fuel and special fuel retail price, including any federal, state and local excise taxes on such fuel, for the forthcoming 12-month period beginning June 1, by adjusting the initially established price by the percentage change in the average monthly gasoline price component of the Consumer Price Index, issued by the United States Department of Labor, for the most recent 12-month period ending March 31, compared to said average for the 12-month period ending March 31, 1984. However, the adjustment provided herein shall first be made for the forthcoming 12-month period beginning June 1, 1985.

(b) The tax per gallon shall be computed as 5 percent of said total retail price, rounded to the nearest one-tenth of one cent.

(c) The initially established price is $1.148 per gallon.

Eastern asserts that the price set is not related to the actual price of aviation fuel and, therefore, is arbitrary and unreasonable. We do not agree. The tax is levied on first withdrawal of the fuel from the storage tanks and is imposed on all consumers equally regardless of the nature of transport. We find no merit in Eastern's argument that the predetermined price structure invidiously discriminates against airlines.

Eastern also contends that section 6 of the law constitutes an improper delegation of legislative power by relating the price adjustment for future periods to the percentage change in the average monthly gasoline price component of the Consumer Price Index issued by the United States Department of Labor. The Consumer Price Index referred to in the law is authorized by 29 U.S.C. §§ 2, 2a and 2b (1976). Under these code provisions, the Secretary of Labor has broad powers to collect, collate and re-

port statistics, and, to that end, has the power to use bureaus provided for the department and is authorized to call upon other departments of the federal government for data and the results obtained by them. More importantly, the Secretary of Labor may "collate, arrange, and publish such statistical information so obtained in the same manner as to him may seem wise." 29 U.S.C. § 2. The Consumer Price Index is widely used by the federal government to determine such things as cost of living increases in social security, retirement benefits for the military, and other appropriations such as child care payments.

The circuit court in its final judgment determined that the method of appropriation in chapter 83-3 is equivalent to the method which allowed the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index and which was found to be constitutional in *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979). Eastern argues that the instant case should be distinguished from *Gindl* because here the Department of Revenue is delegated to determine the price upon which the tax will be based by using a federal agency's index to be adopted in the future and over which no Florida agency has any control. Eastern argues that since the department, in arriving at the tax applicable to the price, must, of necessity, rely on an administrative act of the United States Department of Labor which will first take place on March 1, 1984, the legislature has shifted its constitutional duties to that federal agency contrary to the established rule of this state, citing as authority this Court's decision in *State v. Welch*, 279 So.2d 11 (Fla. 1973).

In *State v. Welch*, this Court considered the constitutionality of a portion of the former Florida Drug Abuse Law, chapter 404, Florida Statutes (Supp. 1972), which purported to prohibit certain acts by reference. Specifically, the law declared that it was the intent of the legislature to include under that chapter "all drugs controlled

by the drug abuse laws of the United States, now or in the future," in addition to those specified under Florida law. § 404.515, Fla.Stat. (Supp. 1972). In *Welch* this Court looked to the rule of law announced in *Freimuth v. State*, 272 So.2d 473 (Fla. 1972). There, the Court said that the legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or an administrative body might see fit to adopt in the future. 272 So.2d at 476. Accordingly, this Court held the statute unconstitutional for attempting to incorporate by reference future legislative and/or administrative actions of jurisdictions outside Florida. *Id.*

We believe that Eastern's reliance on the aforementioned language is misplaced. The statute under attack merely provides that an adjustment be made to the fuel price which is based on the percentage change in the average monthly gasoline price component of the Consumer Price Index. Here, the legislature is merely setting forth the manner in which the department is to determine the appropriate total motor fuel and special fuel retail price. The department is directed with precision how to make such a determination. We think the language of *Welch* and *Freimuth* should be interpreted to apply to statutes which incorporate federal statutes or administrative rules which substantively change the law, and not to a statute which incorporates a federal index to provide aid in making a ministerial determination.

Furthermore, we do not agree with Eastern's contention that the statute is also constitutionally infirm because the Department of Revenue will utilize a consumer price index which is to be determined *after* the effective date of the act. In *Gindl* we upheld a statutory provision

which required a computation based on the most recent publication of the Florida Price Level Index prepared by the Department of Administration. The statute was to take effect July 1, 1976. The Department of Education intended to base the distribution on a survey which would be started in October or November of 1976 and completed during the early part of 1977. In other words, the effect of the statute was to reach forward and allow distribution to be calculated on the most recent publication of the Florida Price Level Index, an index which was not in existence when the law became effective. We agree with the circuit court's determination that the method of appropriation in chapter 83-3 is equivalent to the method approved in *Gindl.*

The final issue which Eastern has raised is whether chapter 83-3 unconstitutionally discriminates against interstate commerce since its tax credit provisions provide a direct commercial advantage to local agriculture and commercial fishing to the detriment of similar interstate activities. The relevant section of the law provides:

> § 212.92 Refunds.—
>
> (e) Refund to farmers and fishermen.—
>
> 1. [A]gricultural purposes means motor fuel or special fuel used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm and no part of which is used in any vehicle or equipment driven or operated upon the public highways of this state. This restriction shall not apply to the movement of farm vehicles or farm equipment between farms.
>
> 2. For the purposes of this paragraph, "commercial fishing purposes" shall be construed to mean motor fuel or special fuel used in the operation of boats, vessels, and equipment used exclusively for the taking of fish, crayfish, oysters, shrimp, and sponges from the salt and fresh waters under the jurisdiction

of the state for resale to the public but shall in no way be construed to include fuel used for sports or pleasure fishing, no part of which is used in any vehicle or equipment driven or operated upon the highways of this state.

3. Any person who uses any motor fuel or special fuel for agricultural purposes or commercial fishing purposes on which the tax imposed by this part has been paid shall be entitled to a refund of said tax.

The Department of Revenue questions Eastern's standing to challenge chapter 83-3's full refund provisions, section 212.92(1)(e), 2. & 3., since Eastern is "neither in the *fishing* or *farming business* and . . . Eastern does not contend that farmers and/or fishermen are in direct or indirect competition with their airline enterprise." Eastern does not compete with fishing or agriculture. We agree that Eastern does not have standing to raise the unconstitutionality of these full refund provisions. In *State ex rel. Clarkson v. Philips*, 70 Fla. 340, 70 So. 367 (1915), this Court held that the constitutionality of a provision of a statute cannot be tested by a party whose rights or duties are not affected by it, unless the provision is of such a nature that it renders invalid a provision of the statute that does affect the party's rights or duties.

It is a fundamental principle that a statute, if constitutional in one part and unconstitutional in another part, may remain valid except for the unconstitutional portion. However, this is dependent upon the unconstitutional provision being severable from the remainder of the statute. The severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent. *Cramp v. Board of Public Instruction*, 137 So.2d 828 (Fla. 1962).

Additionally, if the valid portion of the law would be rendered incomplete, or if severance would cause results unanticipated by the legislature, there can be no severance of the invalid parts; the entire law must be declared unconstitutional. *Kass v. Lewin*, 104 So.2d 572 (Fla. 1958). This Court succinctly summarized the general rules regarding severability in *Presbyterian Homes of Synod v. Wood*, 297 So.2d 556 (Fla. 1974), wherein the Court stated:

> An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining valid provisions, that is, if the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; and the good and bad features are not inseparable and the Legislature would have passed one without the other; and an act complete in itself remains after the invalid provisions are stricken.

Id. at 559.

We believe that the legislature's intent could still be accomplished if the full refund provisions relating to local commercial fishing and agriculture were to be eliminated and the remainder of the statute left intact. Therefore, we cannot say that these provisions, were we to declare them unconstitutional, are of such a nature that they would render invalid the portion of the statute that does affect Eastern's rights. Eastern has no standing to raise this issue.

Accordingly, we affirm the order of the circuit court.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and SHAW, JJ., concur.

SUPREME COURT OF FLORIDA

DELTA AIR LINES, INC., *et al.*,
Appellants

v.

DEPARTMENT OF REVENUE,
Appellee

Reported at:

455 So.2d 317 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint by Delta Air Lines in the circuit court of Leon County seeking declaratory and injunctive relief from the enforcement of provisions of chapter 83-3, Laws of Florida, on the ground that the law was unconstitutional. Capitol Air, Inc., Northwest Airlines, Inc., Ozark Air Lines, Inc., Piedmont Aviation, Inc., Republic Airlines, Inc., The Flying Tiger Lines, Inc., United Airlines and USAir, Inc., were granted leave to intervene as party plaintiffs. On May 27, 1983, the circuit court entered its final judgment in favor of the Department of Revenue ruling the law constitutional. Delta appealed to the First District Court of Appeal which certified the case for immediate resolution by this Court.

We described the structure of chapter 83-3 and resolved some of the issues raised by Delta in our decision in *Eastern Air Lines v. Department of Revenue*, 455 So.2d 311 (Fla. 1984). There are two issues which Delta raises which we were not faced with in that decision.

First, Delta raises the issue of whether chapter 83-3 violates the commerce clause of the United States Constitution by providing a corporate income tax credit for Florida-based airlines. Chapter 220, Florida Statutes (1981), imposes an income tax on domestic corporations and foreign corporations qualified to do business in Florida or actually doing business in Florida. Section 61 of chapter 83-3 creates section 220.189, Florida Statutes (1983), and provides a credit against the corporate income tax for air common carriers who have a corporate or business home office in Florida and also maintain a work force of more than 1200 employees in the state. This credit offsets up to one-half of the air carriers' fuel tax liabilities with a maximum credit of $5 million.

A state tax is not *per se* invalid because it burdens interstate commerce since interstate commerce may constitutionally be made to pay its own way. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977); *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823 (1938). Taxes have been sustained against commerce clause challenges when the tax: 1) is applied to an activity with a substantial nexus with the taxing state; 2) is fairly apportioned; 3) does not discriminate against interstate commerce; and 4) is fairly related to the services provided by the state. *Complete Auto*, 430 U.S. at 279, 97 S.Ct. at 1079. No state may, consistent with the commerce clause, "impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 329, 97 S.Ct. 599, 607, 50 L.Ed.2d 514 (1977); *Northwestern States Port-*

land Cement Co. v. Minnesota, 358 U.S. 450, 457, 79 S.Ct. 357, 361, 3 L.Ed.2d 421 (1959). This principle follows from the basic purpose of the commerce clause which is to prohibit preferential trade areas destructive of the free commerce anticipated by the United States Constitution. *Boston Stock Exchange*, 429 U.S. at 329, 97 S.Ct. at 606; *Dean Milk Co. v. Madison*, 340 U.S. 349, 356, 71 S.Ct. 295, 298, 95 L.Ed. 329 (1951).

In *Boston Stock Exchange* the United States Supreme Court found unconstitutional a state stock transfer tax containing credit provisions which had the effect of discriminating against interstate commerce to the direct commercial advantage of local business. The transfer tax was imposed if any one of five events (sale, transfer, delivery, etc.) occurred within the state. The rate of tax was based upon the price of the security. The total tax was determined by the number of shares involved in the taxable event. The imposition of the tax itself was found to be constitutional. However, the credit structure of the tax was found to be unconstitutional. The credit amendments to the tax resulted in a scheme in which intrastate sales received a preferential fifty percent reduction in the rate of tax imposed and were given a maximum tax ceiling of $350. Out-of-state sales, however, were subject to the full tax rate without any ceiling. Because it imposed a greater tax liability on out-of-state sales than on in-state sales, the New York transfer tax fell "short of the substantially evenhanded treatment demanded by the [c]ommerce [c]lause." 429 U.S. at 332, 97 S.Ct. at 608.

Another tax statute whose discriminatory credits and exemptions provided the basis for a finding of unconstitutionality was the Louisiana statute reviewed in *Maryland v. Louisiana*, 451 U.S. 725, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981). There, a tax was imposed on certain uses of natural gas coming into the state. The tax was imposed to equalize competition between locally produced gas subject to the state's severance tax and gas coming into the

state from the outer continental shelf which was free of the severance tax. The use tax provided an exemption for gas consumed within the state. It also provided a tax credit against severance taxes for all use taxes paid, thereby encouraging investment in local mineral exploration and development and discouraging investment and development of the outer continental shelf and other states. The Court found the statute unconstitutional in light of the discriminatory effect produced by the pattern of credits and exemptions which violated the principle of equality. 451 U.S. at 759, 101 S.Ct. at 2135.

The circuit court here found that "the tax is on fuel purchased *in* the state and all consumers are taxed equally" and thus concluded that there is no burden on interstate commerce similar to that found in *Maryland v. Louisiana*. The court misconstrued the nature of the discrimination worked against interstate commerce by the corporate tax credit. The question is not one of whether Florida may impose this tax on fuel purchased in Florida for use in interstate commerce. Rather the issue is whether the tax with its attendant credit provision produces a discriminatory effect on interstate commerce. The credit provision of chapter 83-3 clearly discriminates against interstate commerce because the corporate tax credit provides a *direct commercial advantage* to Florida-based air common carriers over non-Florida-based carriers.

The circuit court also found *Boston Stock Exchange* inapplicable stating that, in the present case, "the legislature is not trying to tax any out-of-state transactions." The circuit court misconstrued the holding in *Boston Stock Exchange*. The United States Supreme Court in *Boston Stock Exchange* was not concerned with whether the transaction occurred in New York or outside the state, but whether the credit structure of the tax favored

in-state business and discriminated against interstate commerce.

The circuit court also relied on *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982). In *Archer Daniels* the Supreme Court of Minnesota struck down a tax credit statute similar to the Florida-based tax credit provided in chapter 83-3. Minnesota imposed an excise tax of thirteen cents per gallon on all gasoline sold in the state including gasohol. The taxing statute was amended in 1980 to provide a four cents per gallon partial exemption for gasohol made from Minnesota farm products and blended with alcohol distilled in Minnesota. A non-resident alcohol producer challenged the constitutionality of this statute alleging that the higher taxes imposed on non-resident producers discriminated against interstate commerce. The court found that the exemption violated the commerce clause noting that the act attempted to unfairly preserve local markets for local interests by conferring an artificial economic advantage to local interests under the state's taxing power. *Id.* at 599. The circuit court ruled that *Archer Daniels* dealt with out-of-state production or consumption and that chapter 83-3 in no way affects out-of-state production or consumption. This approach again overlooks the real issue in this case. Just as the Minnesota statute favored in-state gasohol producers, chapter 83-3 confers an artificial economic advantage on those interstate air carriers who maintain corporate or business home offices in Florida over those competing air carriers who base their corporate headquarters outside the state.

The circuit court continued its erroneous analysis under the commerce clause by referring to *Faircloth v. Mr. Boston Distiller Corporation*, 245 So.2d 240 (Fla. 1970), as supporting the proposition that this Court has upheld special tax exemptions to encourage Florida industry. The court's reliance on *Faircloth* is misplaced because that case involved a challenge to a state excise tax based

upon equal protection and due process arguments. The commerce clause was not an issue in that case.

The circuit court has misconstrued the analysis necessary to determine whether a statute discriminates against interstate commerce. The test under the commerce clause is, as we have noted, whether the statute discriminates against interstate commerce by providing a direct commercial advantage to local commerce. The corporate income tax credit provides a direct commercial advantage to select Florida-based air carriers and thereby violates the commerce clause.

In *Eastern*, 455 So.2d 311 (Fla. 1984), we discussed the proper analysis to determine whether a statutory provision was severable from the remainder of the statute. We find that the corporate tax credit provision, now section 220.189 (Florida Statutes 1983), can be logically separated from the remaining valid provisions of chapter 83-3 without hampering the legislature's intent to provide a transportation fund for the state. Thus, we strike that provision which extends a corporate income tax credit to Florida-based air carriers. We believe this will still accomplish the legislature's primary purpose—to tax corporations qualified to do business in Florida or actually doing business in Florida.

Delta also challenges section 6 of the law as being a road-user tax totally unrelated to the services provided by the state and thus violative of the commerce clause. Delta states in its brief that the first gas tax and the corresponding first four cents of the special fuel tax formerly imposed under chapter 206, Florida Statutes (1981), levied an *excise* tax specifically on road-users. Delta also refers to the new provision as "the new sales tax." However, the thrust of Delta's argument is that this tax is a *user* tax and, as such, fails the fourth prong of the text [sic] enunciated in *Complete Auto*. Delta argues that it and other interstate air common carriers do not use the roads in Florida and, therefore, the meas-

ure of the tax bears no relationship to Delta's presence or activities in the state.

We must disagree with Delta's argument. First, the tax is not a road-user tax. It is an excise tax imposed under part II of chapter 212, which is commonly referred to as the sales tax law of the state of Florida. The tax is imposed on the privilege of engaging in certain businesses, including the selling of motor fuels and special fuels in the state. *All purchasers* of motor fuel or special fuel are taxed on the incident of first withdrawal. The funds generated are to be deposited in a state transportation fund and are not, as Delta has asserted, to be restricted to only road use.

Our interpretation of this statute as an excise tax is consistent with prior United States Supreme Court decisions which reviewed similar statutes dealing with taxes on fuel used by airlines.

In 1933 the United States Supreme Court was faced with a challenge to a Tennessee statute which imposed an excise tax on the privilege of selling, storing, or distributing gasoline within the state. *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249, 53 S.Ct. 345, 77 L.Ed. 730 (1933). The proceeds of the tax were to be used solely in the construction and maintenance of a highway system in the state. The appellant rail carrier contended that the tax was in effect a tax upon the use of the gasoline in appellant's business as an interstate carrier and, thus, an unconstitutional burden on interstate commerce. *Id.* at 265, 53 S.Ct. at 349, 77 L.Ed. at 737. The court noted that gasoline having come to rest in storage is taxable by the state, notwithstanding its prospective *use* as an instrument of interstate commerce, much the same as a right of way, rolling stock, or other instruments of interstate commerce are subject to local property taxes. Accordingly, the Court stated:

> [T]here can be no valid objection to the taxation of the exercise of any right or power incident to ap-

> pellant's ownership of the gasoline, which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, [279 U.S. 245, 49 S.Ct. 279, 73 L.Ed. 683 (1929)], supra. Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before use of the gasoline in interstate commerce begins. The tax imposed upon their exercise is therefore not one imposed on the use of the gasoline as an instrument of commerce and the burden of it is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations. . . . .
>
> . . . [T]he levy is a tax, not a toll or charge for use of the highways. . . .

Id. at 268, 53 S.Ct. at 350.

In *Eastern Air Trasport, Inc. v. South Carolina Tax Commission*, 285 U.S. 147, 52 S.Ct. 340, 76 L.Ed. 673 (1932), the Supreme Court upheld a state tax on the sale of gasoline within the state. The suit was brought by an interstate air carrier which argued that the tax placed a direct burden on interstate commerce. The Court found that the tax, which was described in the statute as a license tax, was for the privilege of carrying on the business of selling gasoline. The Court emphasized that under the circumstances the validity of the tax would not be affected by whether the tax was construed to be an excise tax or a property tax. The Court stated:

> There is no substantial distinction between the sale of gasoline that is used in an airplane in interstate transportation and the sale of coal for the locomotives of an interstate carrier, or of the locomotives and cars themselves bought as equipment for interstate transportation. A non-discriminatory tax upon local sales in such cases has never been regarded as

> imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the State may be subjected.

Id. at 153, 52 S.Ct. at 341.

Similarly, the Court upheld a Wyoming law which taxed all gasoline "used or sold" in the state and applied to all gasoline imported for use upon its withdrawal from storage tanks in *Edelman v. Boeing Air Transport, Inc.*, 289 U.S. 249, 53 S.Ct. 591, 77 L.Ed. 1155 (1933). The Court described the tax in the following manner.

> The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the State or on going out. It is at the time of withdrawal alone that "use" is measured for the purposes of the tax. The stored gasoline is deemed to be "used" within the State and therefore subject to the tax, when it is withdrawn from the tanks. . . .
>
> A State may validly tax the "use" to which gasoline is put in withdrawing it from storage within the State, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce. Such a tax cannot be distinguished from that considered and upheld in *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace*, supra. There it was pointed out that "there can be no valid objection to the taxation of the exercise of any right or power incident to . . . ownership of the gasoline which falls short of a tax directly imposed on its use in interstate commerce, deemed forbidden in *Helson v. Kentucky*, 279 U.S. 245, 73 L.Ed. 683, 49 S.Ct. 279." As the exercise of the powers taxed, the storage and withdrawal

> from storage of the gasoline, was complete before interstate commerce began, it was held that the burden of the tax was too indirect and remote from the function of interstate commerce, to transgress constitutional limitations.

Id. at 252, 52 S.Ct. at 592 (emphasis supplied).

The Supreme Court of the United States has stated that the constitutional power of a state to tax does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation. *Nashville, Chattanooga & St. Louis Railway v. Wallace*, 288 U.S. 249, 268, 53 S.Ct. 345, 350, 77 L.Ed. 730 (1933). A state is free to pursue its own fiscal policies, "if by the practical operation of a tax the state has exerted power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940). *See also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625, 101 S.Ct. 2946, 2957, 69 L.Ed.2d 884 (1981); *General Motors Corp. v. Washington*, 377 U.S. 436, 440-41, 84 S.Ct. 1564, 1567-68, 12 L.Ed.2d 430 (1964). The relevant inquiry under the fourth prong of the *Complete Auto* test is not, as Delta seems to suggest, the *amount* of the tax or the *value* of the benefits allegedly bestowed as measured by the costs the state incurs on account of the taxpayer's activities. *Commonwealth Edison*, 453 U.S. at 625, 101 S.Ct. at 2957. The first prong of *Complete Auto* clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before *any* tax may be levied on it. The fourth prong of the test is intended to impose the additional limitation that the measure of the tax be reasonably related to the extent of the contact. *Id.* at 626, 101 S.Ct. at 2958; *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254, 58 S.Ct. 546, 548, 82 L.Ed. 823 (1938).

This tax is unlike a true "user fee" or user tax. Perhaps the best illustration of a true user tax is found in *Evansville-Vanderburgh Airport Authority v. Delta Air Lines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). In *Evansville-Vanderburgh* the United States Supreme Court reviewed a use tax imposed on airlines by an Indiana municipality. All interstate air carriers were charged a user service charge for each enplaning passenger. The monies collected were to defray the cost of airport construction and maintenance. The tax was upheld and found to be fairly related to the use of the facilities by the airlines.

The present tax is more analogous to that found in *Commonwealth Edison* where the United States Supreme Court upheld a Montana severance tax on coal. Coal producers challenged the tax contending that the severance tax had a discriminatory effect on interstate commerce since ninety percent of Montana's coal was shipped out-of-state and, therefore, the tax burden was borne primarily by out-of-state consumers. The Court found that the coal producers' claim hinged on an inquiry into the fourth prong of *Complete Auto*. First, the Court concluded that, contrary to appellant's contention, the severance tax was a general revenue tax. 453 U.S. at 621, 101 S.Ct. at 2955. The Court also concluded that the fourth prong of *Complete Auto* was satisfied by the Montana tax. The Court stated:

> Because it is measured as a percentage of the value of the coal taken, the Montana tax is in "proper proportion" to appellants' activities within the State and, therefore, to their "consequent enjoyment of the opportunities and protections which the State has afforded" in connection with those activities.

Id. at 626, 101 S.Ct. at 2958 (citing *General Motors Corp. v. Washington*, 377 U.S. at 440-41, 84 S.Ct. at 1567-68).

We believe the imposition of this excise tax on the *purchase* of motor fuel and special fuel in the state of Florida is fairly related to those purchasers' enjoyment of the protections and benefits afforded by the state and the privilege of doing business in an organized society. Delta operates in at least nine of the major airports throughout the state of Florida transporting persons and property and engaging in the business of operating a commercial airline for profit. The persons and property which are transported through the air by airlines such as Delta do not come to rest at the airports. Those persons and any property generally must then use the public roads and highways of the state in automobiles or trucks or some other means of public transportation. We must disagree with Delta's contention that the tax is invalid because it is not fairly related to the services provided by the state.

Accordingly, we affirm that portion of the circuit court's order which upheld section 6 of the law as not being violative of the commerce clause. But, we reverse the circuit court's order insofar as it upheld the corporate tax credit to Florida-based airlines and strike that section of chapter 83-3.

It is so ordered.

ALDERMAN, C.J., and BOYD, OVERTON, McDONALD and SHAW, JJ., concur.

SUPREME COURT OF FLORIDA

DEPARTMENT OF REVENUE,
Appellant

v.

WARDAIR CANADA, LTD.,
Appellee

Reported at:

455 So.2d 326 (Fla. June 14, 1984), *rehearing denied*, Sept. 12, 1984

ADKINS, Justice.

This case is before us on an order from the First District Court of Appeal certifying the issue in the case to be of great public importance. We have jurisdiction. Art. V, § 3(b)(5), Fla. Const.

This case arose with the filing of a complaint in the circuit court in Leon County by Wardair Canada, Ltd. (hereinafter Wardair) challenging the constitutionality of chapter 83-3, Laws of Florida. The court consolidated this case with an action filed by Air Jamaica for the purpose of trial. The parties stipulated to a procedure whereby the airline was allowed to self-accrue the sales tax imposed under chapter 83-3 during the pendency of the proceedings subject to certain conditions. The circuit court entered an order of final judgment on July 19, 1983, separate from its order in the Air Jamaica case. The court upheld the constitutionality of the law dismissing three of Wardair's counts in its complaint but ruled in favor of the airline in recognizing an exemption to the

airlines to the motor fuel and special fuel tax imposed by the law by virtue of certain executive agreements with the United States. The trial judge had previously upheld chapter 83-3 in *Delta Airlines, Inc. v. Department of Revenue*, No. 83-761 (Leon County Cir.Ct.—Civ.Div. May 23, 1983). The Department of Revenue filed its notice of appeal from the trial court's final judgment on July 21, 1983. Shortly thereafter, Wardair filed its notice of cross-appeal. The First District Court of Appeal then certified the case to this Court.

This Court has ruled on three of the four issues raised by Wardair in its original complaint and on cross-appeal in its decision in *Delta Airlines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984). The department has appealed the circuit court's ruling recognizing an exemption to the excise tax for the foreign airlines. The circuit court found that chapter 83-3 was inconsistent with a Non-scheduled Air Service Agreement between the United States and Canada, May 8, 1974, T.I.A.S. 7826.

The circuit court's order noted that article XII(1) of the Air Services Agreement exempts both the United States and Canada from national duties and charges on fuels and article XIV provides that neither party will discriminate against the other. The court then relied on its holding in *Lineas Aereas Costarricenses, S.A. v. Department of Revenue*, No. 83-761 (Fla. 2d Cir. June 21, 1983). In that case the court held that when the federal policy is to exempt foreign airlines from fuel taxes and prevent discrimination, the individual states are precluded from acting in that area.

The department argues that the agreement is inapplicable to estop the enforcement of chapter 83-3 for two reasons: 1) the agreement is not self-executing; and 2) the agreement specifically addresses only national customs, duties, excise taxes and charges with no application to or restriction on state taxation schemes. The circuit court did not expressly recognize a distinction between

executory and non-executory agreement provisions in its order.

The department asserts that the following provisions in the agreement are executory and thus require an additional legislative enactment to effect implementation:

> Each Contracting Party shall exempt the carriers of the other Contracting Party to the fullest extent possible under its national law from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical supplies . . . and other items intended for use solely in connection with the operation, maintenance or servicing of aircraft of the carriers of the other Contracting Party. The exemptions granted by this paragraph shall apply to items:
>
> (a) introduced into the territory of one Contracting Party by or on behalf of the carriers of the other Contracting Party;
>
> (b) retained on board aircraft of the carriers of one Contracting Party upon arriving in or leaving the territory of the other Contracting Party;
>
> (c) taken on board aircraft of the carriers of one Contracting Party in the territory of the other Contracting Party and intended solely for use in international air services; whether or not such items are consumed wholly within the territory of the Contracting Party granting the exemption.

Because we agree with the department's conclusion that the agreement is inapplicable because it specifically addresses only national customs, duties, and excise taxes and charges, we find it unnecessary to determine whether these provisions are executory or not. The Air Services Agreement is not a treaty ratified by the United States Senate. However, it is a formally executed international agreement and, as such, is valid and binding as if ap-

proved by act of Congress. *United States v. Pink*, 315 U.S. 203, 62 S.Ct. 552, 86 L.Ed. 796 (1942). The purpose of the agreement is obviously to preserve, protect and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations.

The doctrine of preemption which is given effect through the supremacy clause mandates that federal law overrides any state regulation where there is an actual conflict between the two sets of legislation such that both cannot validly stand. The United States Supreme Court has formulated analytical standards for preemption. In *Hines v. Davidowitz*, 312 U.S. 52, 61 S.Ct. 399, 85 L.Ed. 581 (1941), the Court construed the Federal Alien Registration Act of 1940 to override Pennsylvania's Alien Registration Act of 1939. The Court noted that if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," federal regulation must preempt state regulation to give effect to the desired national policy. *Id.* at 67, 61 S.Ct. at 404.

Fifteen years later the validity of a Pennsylvania state regulation was again before the Court in *Pennsylvania v. Nelson*, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640 (1956). The Court held that federal anticommunist legislation superseded the state's sedition act and enunciated a three-prong test to determine the supremacy of a federal regulatory scheme over state regulation in the same or similar area. The test involves an analysis of: 1) the pervasiveness of the federal regulatory scheme; 2) federal occupation of the field as necessitated by the need for national uniformity; and 3) danger of conflict between state laws and the administration of the federal program.

The provisions in the agreement between the United States and Canada clearly express an intent to apply to only national taxes and duties. We do not believe that the scheme of this agreement is so pervasive so as to per-

mit the reasonable inference that Congress intended to preclude the state's power to tax. Also, the competitive equality between the two nations would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the Canadian carrier did not.

We determined in our decision in *Delta Air Lines, Inc. v. Department of Revenue*, 455 So.2d 317 (Fla. 1984), that the tax imposed by chapter 83-3 met the four-prong test of *Complete Auto Transit v. Brady*, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed.2d 326 (1977), and thus did not violate the commerce clause. In 1979, the United States Supreme Court decided the case of *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 99 S.Ct. 1813, 60 L.Ed.2d 336 (1979), setting forth two additional requirements to be met when foreign commerce is involved. The Court stated:

> [A]n inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than interstate commerce. In addition to answering the nexus, apportionment, and nondiscrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and, second whether the tax prevents the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments." If a state tax contravenes either of these precepts, it is unconstitutional under the Commerce Clause.

Id. at 451, 99 S.Ct. at 1823.

The trial court correctly found that the first requirement of *Japan Line* was not a concern because there had been no de facto showing of multiple taxation or substantial risk of the same. *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267, 98 S.Ct. 2340, 57 L.Ed.2d 197; *Shell Oil Co. v. State Board of Equalization*, 64 Cal.2d 713, 51 Cal.Rptr. 524, 414 P.2d 820 (1966).

For the reasons previously discussed, we also hold that the tax meets the second requirement of *Japan Line*. The agreement provides for efforts at exemption from national excise taxes, inspection fees and other national charges but does not provide for exemptions from state excise taxes. We must presume this has been done intentionally. We do not believe this legislation prevents our federal government from speaking with one voice.

Accordingly, we affirm the order of the circuit court as to the constitutionality of chapter 83-3 except that portion of the law pertaining to a tax credit for Florida corporations. In *Delta* we determined that portion to be unconstitutional and it was stricken from the law. We reverse the circuit court to the extent that it recognized an exemption for foreign airlines.

It is so ordered.

ALDERMAN, C.J., and BOYD and SHAW, JJ., concur.

OVERTON, J., dissents with an opinion in which McDONALD, J., concurs.

OVERTON, Justice, dissenting.

I dissent. I find that the State of Florida has no authority to ignore valid air service agreements between the United States Government and the governments of other countries which exempt airlines based in participating nations from duties and charges on fuels. In my view, the individual states of this country are precluded by those agreements from taxing fuel used by foreign airlines. To accept the majority's view means that all United States airlines could, in turn, be subject to local government taxation on fuel in foreign countries. We are one country and our constitution requires us to speak with one voice when the federal government enters into agreements and treaties with foreign governments. *See* U.S. Const. art. I, § 8; art. VI. This state is precluded from enforcing this tax against this airline.

McDONALD, J., concurs.

APPENDIX C

DISTRICT COURT OF APPEAL
FIRST DISTRICT
TALLAHASSEE, FLORIDA 32301
Telephone No. (904) 488-6152

Date July 19, 1983

Case No. AT-305

DEPARTMENT OF REVENUE,
Appellant/Petitioner

vs.

LINEAS AREAS [sic] COSTARRICENSES, S.A.
Appellee/Respondent

ORDER

Upon consideration of appellant's Suggestion for Certification of Appeal and Rule 9.125, the Court certifies that the Final Judgment rendered by the trial court on June 14, 1983 requires immediate resolution by the Supreme Court.

[SEAL]

By Order of the Court

RAYMOND E. RHODES
Clerk

APPENDIX D

IN THE SECOND CIRCUIT COURT
IN AND FOR LEON COUNTY
FLORIDA

Case No. 83-964

LINEAS AEREAS COSTARRICENSES, S.A.,
a Costa Rican corporation,
Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and arguments of counsel for the respective parties and the intervenors, and on the briefs of counsel for the parties, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Laws of Florida, title "an act relating to transportation finance and administration":

COUNT I: discriminates against foreign airlines in violation of Congress' exclusive power over foreign commerce, pursuant to Article I, Section 8, Clause 3 of the United States Constitution,

COUNT II: is inconsistent with the Air Transport Services Agreements lawfully entered into by the President of the United States,

COUNT III: denies foreign airlines equal protection of the laws under the United States Constitution,

COUNT IV: violates Article I, Section 9, of the Florida Constitution because there is no reasonable relationship between the taxes imposed and the services provided to foreign airlines, and

COUNT V: is a special law in violation of Sections 10 and 11 of Article III of the Constitution of the State of Florida.

Plaintiff prays for a permanent injunction to prevent Defendant Department of Revenue (DOR) from assessing and collecting fuel taxes pursuant to Senate Bill 8-A.

2. In light of this Court's recent decision in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761, (Leon County Circuit Court—Civil Division, May 23, 1983), the assertion [sic] in Counts I, III, IV, and IV [sic] are without merit. However, the Court finds merit in the assertion in Count II and hereby grants a permanent injunction for the reasons subsequently discussed. This Court upholds the constitutionality of Senate Bill 8-A but recognizes an exemption for foreign airlines based on the bilateral agreements entered into between the federal government and Plaintiffs and intervenors in this case.[1]

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[1] Commercial Air Transport Agreement, January 8, 1947, United States-Ecuador, T.I.A.S. 1606; Aviation Transport Services Agreement, October 24, 1956, United States-Colombia, T.I.A.S. 5338; Air Transport Services Agreement, April 13, 1953, United States-Venezuela, T.I.A.S. 2813; Air Transport Services Agreement, August 15, 1960, United States-Mexico, T.I.A.S. 4675; Air Transport Services Agreement, May 10, 1947, United States-Chile, T.I.A.S. 1905; Air Transport Services Agreement, September 22, 1977, United States-Argentina, T.I.A.S. 8978; Air Transport Services Agreement, February 11, 1946, United States-United Kingdom, T.I.A.S. 1507; Aviation Agreement, November 22, 1961, United States-United Kingdom, T.I.A.S. 4955; Memorandum of Consultations, April 25, 1982, United States-Brazil; Memorandum of Understanding, August 17, 1979, United States-Costa Rica.

DISCUSSION

The Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, vests with Congress the exclusive power to regulate foreign commerce. The Supremacy Clause, Article 4, Section 2, states that the Constitution and the laws made pursuant thereto are the supreme law of the land. Therefore, when Congress traditionally regulates in a certain area such as in the present case by extending reciprocal agreements to foreign airlines to "strengthen even more the cultural welfare and economic bonds . . . and ensure continued development in the common welfare on bases of equality and reciprocity", Air Transport Services Agreement with Mexico, p. 1, the states are preempted or superseded from acting in this area. Further, Congress has extended federal tax exemption from custom duties, inspection fees, excise taxes, and other national duties or charges to foreign airlines "in order to prevent discriminatory practices and to assure equality of treatment." Air Transport Services Agreement with Mexico, Article 7,[2] and that the respective authorities will attempt to facilitate maximum efficiency "with a fair and equal opportunity" for the airlines to operate on the designated routes. Mexico Agreement, Article 8.[3]

Defendant contends that the "fair and equal opportunity" refers only to routes and does not affect excise

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[2] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Article 4; Chile Agreement—Article 3; Ecuador Agreement —Article 3; United Kingdom Agreement—Article 3; Costa Rica Memorandum—Article 9; Brazil Agreement—Article 9; Colombia Agreement—Article 7; Argentina Agreement—Section 2(F).

[3] Similar or equal provisions appear in the Air Transport Services Agreements listed in footnote 1 as follows: Venezuela Agreement—Annex IV(b); Chile Agreement—Annex A.A; Ecuador Agreement—Annex Section 1.A; Costa Rica Memorandum—Article 9(5); Brazil Memorandum—Section IX; Colombia Agreement—Article 8; Argentina Agreement—Section 2(F).

tax imposition. Fuel is an essential factor in an airlines' [sic] operation, and if its price is increased, the cost to fly to a specific destination is likewise increased. This will adversely affect the economic feasibility of flying to that destination. The foreign airlines involved in this suit fly only between their country and specified cities in the United States. In Florida that city is Miami. They engage in no intrastate or interstate flights, but are confined to flights between their country and the specific city. If a particular state imposes a substantial increase in the cost of flying to a certain city, it is only logical that this disadvantage would inhibit the airlines' desire to continue flying to that city. Therefore, tax imposition does substantially affect the established route and denies the airlines a fair and equal opportunity to serve that route.

It is noteworthy that in the Argentina Agreement, Section 2(F)(3), the wording is that the civil aeronautics authorities will endeavor to ensure "exemption from taxes", without specifying exemption only from national taxes. Most of the agreements specify the referral is to national taxes and Defendant emphasizes this point in its brief as indicating Congress intentionally did not exempt state or local taxes. Consistent with this reasoning, however, Argentina could submit that the failure to specify would imply the federal government would make efforts to ensure exemption from all taxes—state, local, etc. In fact, the memorandum agreement with Costa Rica, Article 9(5) does in fact state that "each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities".

In arguing that Congress' failure to specifically exempt state taxes in the majority of the agreements [sic] Defendant cites *Finland v. Town of Pelham*, 290 N.Y.S.2d (1966), to demonstrate an express statement of Congress in a treaty as compared to the non-express statements in

the present agreements. However, it cannot be concluded that whenever Congress does not speak to an issue that the intent is to affirm state regulation in that area by negative implication. Congress cannot be expected to speak to all aspects of a given situation. The United States Supreme Court spoke directly on this situation in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 451 (1979):

> "The premise of Appellees' argument is that a State is free to impose demonstrable burdens on commerce, so long as Congress has not preempted the field by affirmative regulation. But it long has been 'accepted constitutional doctrine that the commerce clause, without the aid of Congressional legislation . . . affords some protection from state legislation inimical to the national commerce, and that in such cases, where Congress has not acted, this Court, and not the state legislature, is under the commerce clause the final arbiter of the competing demands of state and national interests.'" *Southern Pacific Company v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945).

Similarly, Defendant argues that the agreements between the United States and Costa Rica, Brazil, Trinidad and Tobago, and Honduras are executory and require affirmative legislative action to validate them. *United States v. Postal*, 589 F.2d 862 (5th Cir. 1979). The court in *Postal* states at page 875:

> "it was early decided that treaties affect the municipal law of the United States only when those treaties are given effect by congressional legislation or are, by their nature, self-executing."

but goes on to say at page 876:

> "The question whether a treaty is self-executing is a matter of interpretation for courts when the issue

> presents itself in litigation . . . and, as in the case of all matters of interpretation, the court's attempt to discern the intent of the parties to the agreement so as to carry out their manifest purpose." [sic]

The agreements involved here have no express language that further legislation is necessary, and because, as will be discussed, the federal government recognizes these agreements as effective, this court discredits any argument that these agreements are ineffective because further legislative action is needed. As Plaintiff informs the Court, the challenged agreements are in effect pending exchange of ratification, and the Civil Aeronautics Board recognizes these agreements as effective by having granted Foreign Air Carrier Permits to Costa Rica and by recognizing the validity of the Brazil agreement in decisions. The T.I.A.S. agreements 1507, 4955, and 5209 govern air transportation with Trinidad and Tobago, such agreements made between the United Kingdom and United States. Although no T.I.A.S. agreement exists for Honduras, TAN, the national carrier, has been authorized by the Civil Aeronautics Board. C.A.B. Order 82-6-98 (June, 1982). Even if there were a valid distinction between the effectiveness of an executory agreement as opposed to an executed agreement, the Court here is examining the federal *policy* considerations behind the agreements and these considerations strongly indicate lenient tax burdens on foreign carriers. The agreements, executory or executed, are evidence of this policy as the Supreme Court stated in *United States v. Pink*, 315 U.S. 203, 231 (1941): as "superior Federal policy evidenced by a treaty or international compact or agreement."

Defendant argues in its brief that Plaintiff is trying to elevate the agreements to the status of treaties and appears to discredit this elevation; yet Defendant's cites involve treaties which implies Defendant's recognition of that status. *Pink* appears to treat international agreements with the same to status of treaties, so the distinction is irrelevant.

Regarding the non-express language in the agreements, Defendant cites *Guarantee Trust Co. v. United States*, 304 U.S. 126, 143 (1938):

> "Even the language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them."

In the present case, it seems to be the state who is trying to override the privileges extended to foreign carriers by the federal government, not vice versa. All the bilateral agreements were in effect before Senate Bill 8-A, dating back to 1947 (Ecuador), 1948 (Chile), 1953 (Venezuela) etc. This would seem to indicate that the federal government had established their policy of reciprocal tax exemptions before the State acted. It is, therefore, the state who is impairing a federal right, not vice versa. Defendant also cites *United States v. Pink* at 230:

> "It is of course true that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and jurisdiction of the States of this nation unless clearly necessary to effectuate the national policy."

However, *Pink* goes on to say at p. 231:

> "But state law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international agreement."

Using the *Pink* analysis, derogation from the State's authority in this case is in fact necessary because the apparent policy expressed in the bilateral agreements is for reciprocal tax advantages. This precludes the state from acting in a manner to "frustrate the achievements [sic] of federal uniformity." *Japan Line*, p. 450. The federal concern for equal commercial opportunity between nations supports the policy of Congress to exempt foreign airlines from excise taxes.

The Supreme Court of the United States in *United States v. Belmont*, 301 U.S. 324, 331 (1947), has rather clearly stated the applicable principle as follows:

> "in the case of all international compacts and agreements . . . that complete power over international affairs is in the national government and is not and cannot be subject to any curtailment or interference on the part of the several states."

The test to be used when a state attempts to regulate foreign commerce was articulated in *Japan Line*, page 451:

> "an inquiry more elaborate than that mandated by *Complete Auto* is necessary when a State seeks to tax the instrumentalities of foreign, rather than of interstate, commerce. In addition to answering the nexus, apportionment, and non-discrimination questions posed in *Complete Auto*, a court must also inquire, first, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second, whether the tax prevents the Federal Government from 'speaking with one voice' when regulating commercial relations with foreign governments."

The first requirement is not a concern in the present case because there has been no de facto showing of multiple taxation, and, as the court stated in *Moorman Manufacturing v. Bair*, 437 U.S. 267 (1978), the court will not invalidate a statute where the risk of multiple taxation is merely "speculative." It is the second requirement which concerns the court in the present case. It is not overlooked that in *Japan Line* the tax was an ad valorem levy on certain containers used in seagoing vessels of Japan, where as in this case the tax is upon the withdrawing of expendable fuel from storage. However, the principle of both seems applicable. The levy on the fuel, which is a sine qua non to movement of the aircraft,

seems to be within the class of burdens which the international agreements seek to prevent.

The United States, consisting of fifty individual state governments united under one flag, must present a united front when dealing in economic affairs with other nations. Over the years the federal government has negotiated these bilateral agreements to prevent price discrimination toward U.S. carriers in other nations, these being reciprocal agreements. There have been continuing efforts of the Civil Aeronautics Board to eliminate fuel taxes imposed by other nations.[4] Also, in 1974 Congress enacted the International Air Transportation Fair Competitive Practices Act, 88 Stat. 2102, to protect U.S. carriers from discrimination. By allowing the fifty states to impose individual state taxes, it would thwart the purpose of these federal efforts and infringe on the federal power to regulate foreign commerce.

Concern for Florida's fuel tax was expressed by the United States Department of State in a letter to the Florida Department of Revenue on September 29, 1982 from Matthew V. Scocozza, Deputy Assistant Secretary of State for Transportation and Telecommunication. This letter stated that the United States afforded an exemption from federal taxes and this [sic] if individual states imposed taxes it would "frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation." After reassurances from the Florida DOR in their letter of October 25, 1982, that airlines continued to enjoy "generous tax advantages", Senate Bill 8-A was enacted. The Department of State reacted by sending their letter of March 17,

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[4] Civil Aeronautics Board ("CAB"), Fiscal Year ("FY") 1982/1981 Report to Congress at 94-96; CAB, FY 1980 Report to Congress at 84; CAB, FY 1979 Report to Congress at 103; CAB, FY 1978 Report to Congress at 96; CAB, FY 1977 and Transition Quarter Report to Congress at 106-109, 114-115; CAB, FY 1976 Report to Congress at 103-104.

1982 (date is a typographical error and should read "1983") that the Department was "surprised and distressed" to hear of the changes in the Florida fuel tax as applied to airlines. Mr. Scocozza's first letter spoke of a "generally-accepted and long-standing international practice of reciprocally exempting such items from taxes".

In *Japan Line* at page 448 the Court talks of state taxes in reference to the second "national-uniformity" requirement:

> "a state tax on the instrumentalities of foreign commerce may impair federal uniformity in an area where federal uniformity is essential. Foreign commerce is pre-eminently a matter of national concern."

At page 449 of *Japan Line* the Court cites *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976) as follows:

> "the Federal Government must speak with one voice when regulating commercial relations with foreign governments."

The *Japan Line* court then discusses several ways a state tax may "frustrate the achievements [sic] of federal uniformity", page 450. Among these concerns are asymmetry in international tax structure and retaliatory taxes against American-owned instrumentalities present in other nations:

> "Such retaliation of necessity would be directed at American Transportation equipment in general, not just that of the taxing State, so that the Nation as a whole would suffer." Page 430. [sic; p. 450]

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th

Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) for the Reasons stated in *Delta Air Lines, Inc. v. State of Florida, Department of Revenue*, Case No. 83-761 (Leon County Circuit Court—Civil Division, May 23, 1983).

B. It is further found that Senate Bill 8-A is inconsistent with the undertakings of the United States government in international bilateral agreements with Plaintiff and intervenor foreign airlines.

C. Plaintiff's Counts I, II, IV, and V are hereby dismissed finally.

D. Plaintiff and Intervenors are granted a permanent injunction against Defendant DOR assessing and collecting fuel taxes pursuant to Senate Bill 8-A. Count II of Plaintiff's Complaint is meritorious.

E. This court upholds the constitutionality of Senate Bill 8-A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines who have entered executive agreements with the United States prior to the enactment of this Bill.

DONE AND ORDERED, at Tallahassee, Leon County, Florida, this 1st day of June, 1983.

/s/ Ben C. Willis
BEN C. WILLIS
Circuit Judge

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION

Case No. 83-964

LINEAS AEREAS COSTARRICENSES, S.A.,
a Costa Rican corporation,
Plaintiff,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Defendant.

ORDER

THIS CAUSE having come before the Court upon Plaintiff and Intervening Plaintiffs' Motion to Amend Final Judgment, and the Court having reviewed the file and being otherwise duly advised in the premises, it is

ORDERED AND ADJUDGED as follows:

1. Plaintiff and Intervening Plaintiffs' Motion to Amend Final Judgment is granted;

2. Paragraph C, on the final page of the Judgment, shall read as follows:

> "Plaintiff's Counts I, III, IV, and V are hereby dismissed finally."

3. Paragraph E, on the final page of the Judgment, shall read as follows:

> "This court upholds the constitutionality of Senate Bill 8-A, but recognizes an exemption from the fuel tax for Plaintiff and Intervenor foreign airlines

whose governments have entered into executive agreements with the United States prior to the enactment of this Bill, or who have been granted Foreign Air Carrier Permits by the United States on a basis of reciprocity and comity."

DONE AND ORDERED in Chambers, Tallahassee, Leon County, Florida, this 14th day of June, 1983.

/s/ Ben C. Willis
BEN C. WILLIS
Circuit Court Judge

APPENDIX E

IN THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT
IN AND FOR LEON COUNTY, FLORIDA

Case No. 83-761

DELTA AIR LINES, INC.,
a Delaware Corporation, et al.,
Plaintiffs,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE, *et al.*,
Defendants.

FINAL JUDGMENT

This cause is before the Court on final hearing on the pleadings, evidence and argument of counsel for the respective parties, and on the briefs of counsel for the parties, intervenors and amicus curiae, and the Court having considered all of same and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED:

1. The Plaintiff asserts that Senate Bill No. 8-A, Chapter 83-3, Florida Statutes, titled "an act relating to transportation finance and administration" violates

a) its constitutional right to equal protection under the United States and Florida Constitutions,

b) the Commerce Clause of the United States Constitution,

c) Article III, Sections 10 and 11 of the Florida Constitution.

Intervenor Eastern Airlines also asserts Senate Bill 8-A is an improper delegation of legislative authority. Plaintiff prays for declaratory and injunctive relief to prevent Defendant Department of Revenue (DOR) from assessing and collecting such tax.

2. Senate Bill 8-A was signed into law on March 8, 1983 to become effective April 1, 1983. It revises the tax structure of Chapters 206, 212, and 220, Florida Statutes. Prior to the enactment of said Bill motor fuel was taxed pursuant to Part I, Chapter 206 at the rate of 8 cents per gallon as follows:

a) a "first gas tax" of 4 cents to be used for maintenance and construction of state road [sic],

b) a "second gas tax" of 2 cents to be used by counties to secure bond obligations,

c) a "seventh-cent tax" used by counties for public transportation, and

d) an "eighth-cent tax" used by municipalities for transportation-related expenditures.

Prior to the enactment of Senate Bill 8-A, special fuel was taxed pursuant to Part II, Chapter 206 at the rate of 8 cents per gallon with distribution the same as Part I, Chapter 206. Aviation fuel was exempt from Part II.

Prior to the enactment of Senate Bill 8-A, pursuant to Chapter 212, common carriers paid a sales tax of 5% of the sales price of fuel, such tax accruing and being collected upon first withdrawal from the storage facility. This tax was prorated according to the ratio of the interstate mileage of the carrier to its total mileage for the previous fiscal year.

Prior to the enactment of Senate Bill 8-A, Chapter 220 imposed an income tax on corporations without credit for motor or special fuel taxes paid.

3. Senate Bill 8-A eliminates the "first gas tax" of Part I, Chapter 206 in 206.41 and reduces the special fuel tax in Part II from 8 cents to 4 cents. Distribution is the same as prior to enactment. Thus, under both Part I and Part II of Chapter 205 the tax is reduced from 8 cents to 4 cents per gallon.

Under Chapter 212, the Bill now imposes a 5% sales tax on motor and special fuel based on a predetermined price of $1.148, or 5.7 cents, per gallon until June 1, 1985, at which time the DOR will determine the price according to the most recent Consumer Price Index. Distribution is for "transportation purposes" per Section 206.46 from a Transportation Trust Fund. The Chapter 212 tax upon common carriers will continue to be prorated by intrastate mileage; however airlines will be taxed on all aviation fuel purchased in Florida, regardless of use in interstate or intrastate travel. Chapter 220 now affords a 50% or $5 million (the lesser) credit to Florida-based corporations with 1,200 or more employees.

4. Plaintiff objects to Senate Bill 8-A on the grounds it violated [sic] equal protection by subjecting them to different tax treatment than other common carriers, creates a classification which is discriminated against by higher tax rates, subjects them to a predetermined price not related to the actual price of aviation fuel, and discriminates against foreign corporations by allowing the Chapter 220 tax credit only to corporations with their corporate or home office in Florida.

Plaintiff alleges Senate Bill 8-A violates the United States Constitution Commerce Clause by exceeding the state limitations in taxing interstate commerce because the apportionment is unfair and not based on intrastate use, agricultural and fishing interests are favored by total fuel tax exemption, the tax credit is an attempt to force corporations to establish corporate offices in Florida, there is no nexus between the tax on airlines and the use of

funds for roads, and the tax is not fairly related to services provided to interstate airlines.

Plaintiff originally claimed Senate Bill 8-A violated Article III, Sections 10 and 11 of the Florida Constitution because it was a special law. However, in light of the recent Supreme Court decision in *Department of Legal Affairs, State of Florida, et al. v. Sanford-Orlando Kennel Club., Inc.*, 8 F.L.W., (Fla. April 14, 1983), in which the Court stated it did not matter that the legislature was aware the bill would benefit a certain business, Plaintiff has abandoned this allegation. Plaintiff had originally prayed for attorneys fees pursuant to 42 U.S.C. 1983 and 1988, which issue this court ruled against in a hearing May 11, 1983.

5. Plaintiff Delta Airlines is a Delaware corporation registered to do business in Florida and certified by the Civil Aeronautics Board. They operate from 9 airports in Florida and employ approximately 4,000 employees. Intervenors are various airlines subject to the fuel tax whose aggregate employees number approximately 1,800. None of the intervenors are qualified to receive the Chapter 220 tax credit either because of size or location outside Florida. Delta claims irreparable injury of $9.7 million per year without retroactive interest if Senate Bill 8-A is declared unconstitutional [sic], prolonged legal proceedings, individious discrimination without remedy, and competitive advantage to other classes of common carrers and Florida-based corporations. For these reasons, Plaintiff requests an immediate temporary injunction followed by a permanent injunction and declaratory relief.

6. Defendant DOR contends Senate Bill 8-A is a valid tax measure reasonably related to the legitimate state purpose of stabilizing tax structures and therefore is not subject to the constitutional infirmities urged by Plaintiff. Defendant contends that it has long been established that sales and use taxes imposed for the privilege of en-

gaging in business in the state are valid. *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950); *Kirk v. Western Contracting Company, Inc.*, 216 So.2d 503 (Fla. 1 DCA 1968), *cert. den.* 225 So.2d 535, *app. dism.* 226 So.2d 815; *Florida Revenue Commission v. Maas Brothers*, Inc., 226 So.2d 849 (Fla. 1 DCA 1969), *cert. den.* 237 So.2d 177. Plaintiff elaborates on the point that Senate Bill 8-A is a user fee and not fairly related to the airlines' use of public facilities or roads. However, as Defendant points out, this is an excise tax, not a user fee, and "the constitutional power to levy taxes does not depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds." *Nashville, Chattanooga, & St. Louis Railway v. Wallace*, 288 U.S. 249 (1933) at page 269.

EQUAL PROTECTION

The three main areas of Plaintiff's complaint in the equal protection area are: partial exemptions to other common carriers, predetermined price unrelated to actual price of aviation fuel, and discriminatory tax credit structure.

First, Plaintiff asserts that all common carriers should be treated alike and airlines should also receive the prorated treatment under Chapter 212 that other common carriers receive. Plaintiff cites cases to support this assertion that interstate carriers are "similarly situated" for tax purposes, *Seaboard Air Line Ry. v. Simon*, 47 So. 1001 (Fla. 1908) where all carriers are liable for lost or damaged goods; *Braniff Airways, Inc. v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954) that imposition of taxes on aircraft must be the same as for riverboats; *Ott v. Mississippi Valley Barge Line Co.*, 336 U.S. 169 (1949) that water transportation taxed same as other carriers; *Delta Air Lines, Inc. v. State of Alabama*, No. CV-1162 (Cir. Ct. Montgomery, Ala. May 27, 1981) that airlines are not utilities and receive the same treatment as other transportation modes.

Defendant counters that states have wide latitude in taxation and creating classifications. In *Madden v. Kentucky*, 309 U.S. 83 (1940), the Supreme Court stated at page 88:

> "In taxation even more than in other fields, legislatures possess the greatest freedom of classification."

The Supreme Court has upheld tax classification in ad valorem taxation of corporations, *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973), *reh. den.* 411 U.S. 910; and exempting non-residents from ad valorem taxes on merchandise held in warehouses, *Allied Stores of Ohio v. Bowers*, 348 U.S. 522 (1959), where the Court states there is "no iron rule of equality prohibiting the flexibility and variety that are appropriate to reasonable schemes of state taxation", p. 526.

The courts of Florida have followed *Lehnhausen, Madden*, and *Allied Stores* in *Markham v. Yankee Clipper Hotel, Inc., et al.*, 427 So.2d 383 (Fla. 4th DCA, 1983); and in *Just Valuation & Taxation League, Inc. v. Simpson*, 209 So.2d 229 (Fla. 1968), in which the Florida Supreme Court states at p. 232:

> "the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

The Florida Supreme Court has upheld the constitutionality of Chapter 212 in *Gaulden v. Kirk*, 47 So.2d 567 (Fla. 1950) where a 3% tax was imposed on rentors and lessors of living quarters, but accommodations rented for longer than 6 months and two-family apartment buildings were exempt. The court held this to be a reasonable classification. Likewise the distinction between airlines and other carriers is a reasonable classification and Plain-

tiff has not sustained its burden to "negative every conceivable basis which might support it". *Just Valuation, supra.*

Plaintiff maintains that this distinction is arbitrary and unreasonable and will not pass constitutional muster, citing *Hartford Steam Boiler Inspection and Insurance Co. v. Harrison*, 301 U.S. 459 (1937), to support the allegation that two different forms of business cannot be treated differently. Plaintiff states that airlines and common carriers have been treated similarly for fuel tax purposes since 1963, and that the new bill singles out airlines to pay a disproportionate share of tax. However, Plaintiff does not sustain its burden to demonstrate this classification is "hostile and oppressive" per *Just Valuation*, and this court therefore holds there is no invidious discrimination by creation of an arbitrary classification. Classifying airlines differently from vessels and railroads for fuel tax purposes is not arbitrary. Airlines enjoy advantages and must tolerate some disadvantages due to their distinctive nature. For example, airlines enjoy the advantage of being exempt from ad valorem taxes on the lease of property from the county or other governmental unit pursuant to Chapter 80-368. Vessels and railroads are not exempt. Even though Plaintiff argues that 80-368 also benefits hotels, restaurants, and racetracks, it does not object to this favorable classification and only when disadvantaged does Plaintiff object. Also, proration of mileage for aircraft has proven difficult in the past because of flight patterns over the Gulf of Mexico and Atlantic Ocean to avoid accumulation of intrastate mileage. Defendant approximates that in the past airlines were paying only about 6% of their actual tax due to these flight patterns to avoid flying over the state.

Second, Plaintiff asserts the predetermined price of $1.148 per gallon is not related to the actual price of aviation fuel which customarily is less expensive and at the time of writing was about $.90 per gallon. Plaintiff would have

the DOR adjust the price as market price fluctuates at [sic] tax aviation fuel at the lower rate. This suggestion is not feasible because of the varying prices in different locations, the volatile nature of gas prices, and the objective of the legislature to have a stabilized tax structure. Rather than discriminate against airlines, the legislature has imposed a set price per gallon and all consumers are taxed equally regardless of nature of transport. The tax is levied on first withdrawal from the storage tanks and not at the retail level which latter price would be relatively impossible to ascertain. Plaintiff urges the court to allow the airlines to self-assess taxes as in the past and insists there have been no problems previously. However, as DOR points out, the discrepancy in self assessment renders this point meritless. For the foregoing reasons, this court holds the predetermined price structure does not invidiously discriminate against airlines.

Third, Plaintiff maintains the Chapter 220 tax credit structure favors local business and disadvantages foreign corporations registered in Florida but without a home office there. Plaintiff cites *Department of Revenue v. Amrep*, 358 So.2d 1343 (Fla. 1978) for the proposition that once a corporation is admitted to be registered in a state, it enjoys the full equal protection of the law. This is true, but it also must bear the cost of being privileged to do business in the state. Plaintiff contends that state attempts to tax foreign corporations more stringently than domestic corporations have been invalidated in *Wheeling Steel Corporation v. Glander*, 337 U.S. 562 (1949) dealing with intangible tax on accounts receivable; and *WHYY, Inc. v. Borough of Glassboro*, 393 U.S. 117 (1968) which afforded out-of-state non-profit corporations tax exemptions equal to domestic non-profit corporations; and *O'Connell v. Kontojohn*, 179 So. 802 (Fla. 1938) which invalidated a discriminatory Pensacola tax based on non-city residents who operated bakery trucks in that city. However, the Senate Bill 8-A tax credit is valid because there is a rational basis behind allowing such credit

for domestic corporations: encouraging foreign corporations to establish home offices in Florida. Further, the Supreme Court states in *Carmichael v. Southern Coal & Coke Company*, 301 U.S. 495 (1936) at page 509:

> "The legislature is not bound to tax every member of a class or none, but may make distinctions of degree having a rational basis."

Therefore, if the legislature reasonably believes a tax credit for domestic corporations will further its objective of encouraging in-state incorporation, it may afford this more favorable treatment without discrimination. Just as the legislature enjoys wide latitude in taxation and classifications, it has wide latitude in promoting business where the public interest is served. *Carmichael* at page 512. In *Sanford-Orlando Kennel Club, supra*, the Florida Supreme Court states that the legislature may benefit a certain class so long as it is not unreasonable. There is no unreasonable burden on airlines to establish a home office in Florida if they wish to receive a tax credit. Also, this tax credit is on corporation income tax, not on the sales tax, so a corporation must first pay corporate income tax to avail itself of the Chapter 220 credit. For these reasons, this court holds the tax credit does not favor local business nor discriminate against foreign corporations.

COMMERCE CLAUSE

Plaintiffs contend that Senate Bill 8-A is a state attempt to regulate commerce between the states and exceeds state limitations pursuant to the United States Constitution, Article I, Section 8, Clause 3 grant to Congress. Assuming this bill affects interstate commerce, the state tax must meet the four prongs of *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977), set out on page 278 of that opinion:

1) activity taxed has a sufficient nexus with the State,

2) the tax may not discriminate against interstate commerce,

3) the tax must be fairly apportioned; and

4) the tax must be related to services provided by the state.

Plaintiff contends that Senate Bill 8-A fails at least two prongs of this test because this is a road tax unrelated to airline services, and because the tax is not fairly apportioned and favors certain carriers and local businesses. Plaintiff insists this is a "user" tax because Governor Graham called this session to raise $250 million to fund road construction and maintenance. However, the working of section 206.46 specifically eliminated reference to "construction and maintenance of state roads" in allocation funds from the State Transportation Trust fund into which the fuel taxes are deposited. Instead, the section is worded to provide funds for "transportation purposes" which includes airport and aircraft services, contrary to the assertion of Plaintiff. Plaintiff maintains that because these funds are used for roads and airlines do not use roads, the tax is unrelated to services provided by the state. This is obviously not the case, as the legislature expressly included all transportation purposes in the allocation of funds.

Plaintiff attempts to convince the court that this is a user tax and not an excise tax and is therefore subject to a higher standard of scrutiny. This argument is flawed. As previously noted, favoring local businesses is not necessarily unreasonable or arbitrary. In the case of the Chapter 220 tax credit, Plaintiff is not unreasonably disfavored as there is a legitimate state purpose in encouraging corporate home offices to locate in Florida and to otherwise attract industry to the state. Plaintiff can merely incorporate in Florida if it wishes to receive the credit. Use of public airport facilities is a privilege the airlines enjoy and they should share the cost of these

facilities so long as the cost is reasonable. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609 (1981) supports this statement and goes on to say that courts should not inquire into the amount of the tax or value of benefit received. In *Montana*, a severance tax on coal mined in Montana was upheld as a general revenue tax even though 90% was shipped out of state. Plaintiff tries to distinguish this case, saying Senate Bill 8-A is a use tax. However, this distinction does not withstand scrutiny. The court in *Montana* made it very clear that a state can regulate interstate commerce so long as there is no discrimination. In the case at bar the tax is levied upon all consumers equally based on the quantity of fuel withdrawn and there is no discrimination. The Supreme Court of the United States also deferred to the legislature in establishing tax measures in *Montana*. In *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), a "use" charge for enplaning passengers was upheld as rationally related to the use of facilities, even though such charge was "imperfect". Therefore, even if the Florida fuel tax were considered a use tax, this tax is valid because the funds are allocated for "public transportation" including air facilities, and according to *Montana* the benefit does not have to be measured with mathematical accuracy. The *Complete Auto* test prong #4 does not require a proportional relation of tax to benefit receive, but only requires that the tax be related to the services provided. *Complete Auto* also states that interstate commerce must pay its own way, similar to the reasoning in *Montana*.

To supports [sic] its contention that Senate Bill 8-A favors local business by extending a tax credit only to Florida-based corporations, Plaintiff cites *Maryland v. Louisiana*, 451 U.S. 725 (1981) where a tax on natural gas pumped out-of-state created a burden on interstate commerce. Here the tax is on fuel purchased *in* the state and all consumers are taxed equally so there is no similar

burden on interstate commerce. *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) involves a New York statute which taxed out-of-state transfers. Here the legislature is not trying to tax any out-of-state transactions. In *Archer Daniels Midland Co. v. State*, 315 N.W.2d 597 (Minn. 1982), a tax exemption for gasohol produced from Minnesota products with no comparable exemption for out-of-state product production, was declared invalid as a restriction on interstate commerce. Senate Bill 8-A in no way affects out-of-state production or consumption. The Florida Supreme Court has upheld special tax exemptions to encourage Florida industry. *Faircloth v. Mr. Boston Distiller Corp.*, 245 So.2d 240 (Fla. 1970). This court likewise finds there is no burden on interstate commerce by Senate Bill 8-A and no violation of the Commerce Clause.

IMPROPER DELEGATION OF LEGISLATIVE AUTHORITY

Intervenor Eastern Airlines raises an additional point that Senate Bill 8-A is an improper delegation of legislative authority by allowing the DOR to determine the fuel fixed price after June 1, 1985. *Gindl v. Department of Education*, 396 So.2d 1105 (Fla. 1979, corrected on rehearing 1981) allows the Department of Education to appropriate state funds to a state agency based on the Florida Price Level Index. The method of appropriation in Senate Bill 8-A is equivalent to the *Gindl* method and is a proper delegation of authority.

SEVERABILITY

Both parties agree that this bill should not be severed in part. Additionally, there is no severability clause in the bill. However, in view of the rulings made herein, it is unnecessary to consider or determine any questions of severability.

ACCORDINGLY, IT IS FURTHER ORDERED AND ADJUDGED:

A. This Court finds and determines that Chapter 83-3, Laws of Florida, also referred to as Senate Bill 8-A, is a valid enactment and is not in conflict with the Equal Protection clauses of the United States Constitution (14th Amendment) nor the Florida Constitution (Article I, Section 2); nor with the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3).

B. It is further found that the reference to the Consumer Price Index in future applications of the price per gallon to be used in computing the tax is not an unlawful delegation of legislative power. The Consumer Price Index is a computation by governmental agency of average prices of items of commerce. Reference to this measure is not a delegation of legislative discretion but an economic computation relied upon to apply a legislative policy of a tax based upon an approximate price prevailing at a given time.

C. All challenges to the validity of this statute are found to be without merit.

D. All prayers that the Defendant Department of Revenue be restrained from enforcement of Chapter 83-3 or collecting taxes imposed thereon are hereby denied.

E. The Amended Complaint and this cause be and the same are hereby dismissed finally.

DONE AND ORDERED, this 23rd day of May, 1983.

/s/ Ben C. Willis
BEN C. WILLIS
Circuit Judge

APPENDIX F

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 63,989

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellants/Cross Appellees,

v.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees/Cross Appellants.

[Filed June 29, 1984]

Appeal From the Second Circuit
Court in and for Leon County

APPELLEES' MOTION FOR REHEARING

DAVID A. NELSON
N. FRASER SCHUH, III
SQUIRE, SANDERS & DEMPSEY
Suite 3000, Miami Center
100 Chopin Plaza
Miami, Florida 33131
Phone (305) 577-8700

Attorneys for
Appellees/Cross Appellants

APPELLEES' MOTION FOR REHEARING

Pursuant to Rule 9.330(a) of the Florida Rules of Appellate Procedure, Appelles respectfully move for rehearing of the decision filed herein on June 14, 1984.

The points of law or fact justifying such rehearing are these:

1. The United States government has entered into air transport agreements specifically addressing excise taxes imposed on fuel "by State, regional and local authorities" and establishing a policy of reciprocal exemption from such taxes.

2. By virtue of "Most Favored Nation" provisions contained in several other international agreements, the United States has agreed to extend the protection of these state tax provisions to a number of additional foreign nations.

3. The provisions of the agreements and treaties in question bring this case within the "speaking with one voice" principle of *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979).

In *Department of Revenue v. Wardair Canada, Ltd.*, No. 64,036 (Fla. June 14, 1984), this Court determined that the tax exemption provisions of the Non-Scheduled Air Service Agreement between the United States and Canada were inapplicable because that agreement "specifically addresses only *national* customs, duties, excise taxes and charges . . . ." Slip Op., p. 3. (Emphasis supplied.) *Wardair* was held to be controlling in *Department of Revenue v. Air Jamaica Ltd.*, No. 64,035 (Fla. June 14, 1984), and the instant case was disposed of solely on the basis of the decisions in the companion cases.

Unlike the Canadian agreement involved in *Wardair*, the air transport agreements that the United States has concluded with several of the countries whose carriers are

parties to this case and the *Air Jamaica* case deal expressly with *state* taxes as well as *national* taxes. The agreement with Costa Rica, introduced in the Court below as part of plaintiffs' Exhibit 2 (R370-71), is illustrative: Article 9 of the agreement (a copy of which is attached hereto as an Appendix) specifically refers in paragraph 1 to excise taxes on fuel, among other things; provides in paragraph 2(c) that fuel, lubricants and consumable technical supplies "shall . . . be exempt" from such taxes on a reciprocal basis; and mandates in paragraph 5 that each party use its best efforts to secure for the other parties' airlines "an exemption from taxes, duties, charges and fees *imposed by State, regional and local authorities* on the items specified in paragraphs (1) and (2) of this Article . . . ." (Emphasis supplied.)

A similar undertaking with respect to "taxes, duties, charges and fees imposed by State, regional and local authorities" is found in Article 10(6) of the protocol of April 4, 1979, between the governments of the United States and Jamaica relating to air transport, T.I.A.S. 9613, amending the Air Transport Services Agreement of October 2, 1969, T.I.A.S. 6770. *See also* the agreements identified at page 4 of the trial court's judgment in *Air Jamaica*, set forth as an Appendix to Appellee's Answer Brief herein.

The air transport agreements that address state taxes by name clearly reflect a federal policy in favor of reciprocal exemption from excise taxes at the state level. "A proliferation of state and local taxes," the United States Department of State has confirmed, "would frustrate the international system of reciprocal tax exemptions . . . ." Plaintiff's Exhibit 6, R373-74. Speaking specifically of the Florida tax at issue here, the State Department advised the Florida Department of Revenue that failure to exclude foreign airlines from the tax "will cause serious foreign relations problems." *Id.*

The impact of these provisions is not limited to nations whose aviation agreements with the United States specifically include them. The Treaty of Peace, Amity, Navigation and Commerce between the United States and New Granada [now Colombia] 9 Stat. 881, TS 54 (1848), cited by the Appellees [Answer Brief at 8] provides that "any particular favor [granted] to other nations, in respect of commerce and navigation," shall "immediately become common to the other party . . . ." Other treaties with provisions of the same general import are also cited in Appellees' Answer Brief. By extending the provisions regarding state taxation of airlines such as those found in the agreement with Costa Rica to many other nations, these most favored nation provisions further establish the uniform international policy of the United States favoring reciprocal exemption of airlines from state and local fuel taxes.

Because the United States has entered into air transport agreements expressly addressing state taxes, the necessity for federal uniformity is even clearer here than it was in *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The California property tax at issue in that case was *not* specifically addressed in the Customs Convention on Containers which this country had concluded with Japan, 441 U.S. at 452, but the United States Supreme Court nevertheless held that the California tax could not be applied to Japanese containers for the reason, among others, that it prevented the federal government from "speaking with one voice" in international trade. It follows *a fortiori*, we submit, that the "negative implications of Congress' power to 'regulate Commerce with foreign Nations' under the Commerce Clause," 441 U.S. at 449, preclude Florida from imposing an excise tax on fuel used by the foreign air carriers here.

The motion for rehearing should be granted.

Respectfully submitted,

/s/ N. Fraser Schuh, III
DAVID A. NELSON
N. FRASER SCHUH, III
SQUIRE, SANDERS & DEMPSEY
Suite 3000, Miami Center
100 Chopin Plaza
Miami, Florida 33131
Phone—(305) 577-8700

Attorneys for Appellees/
Cross Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Rehearing was sent by United States Mail, postage prepaid, this 27th day of June, 1984, to LARRY LEVY, ESQ., General Counsel, Department of Revenue, Carlton Building, Room 203, Tallahassee, Florida 32301; JOSEPH C. MELLICHAMP, III, ESQ., Assistant Attorney General, Department of Legal Affairs, The Capitol, LL04, Tallahassee, Florida 32301; and JAMES E. TRIBBLE, ESQ., Blackwell, Walker, Gray, Powers, Flick & Hoehl, Suite 2400, AmeriFirst Building, 1 S.E. 3rd Avenue, Miami, Florida 33131.

/s/ N. Fraser Schuh, III
Attorney for Appellees

APPENDIX

AIR TRANSPORT AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE REPUBLIC OF COSTA RICA

* * * *

ARTICLE 9

Customs Duties and Taxes

(1) On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts, including engines, aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by passengers in limited quantities during the flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges imposed by the national authorities, and not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of a designated airline of the other Party engaged in international air transportation, even when these stores are to be used on

a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in international air transportation; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The exemptions provided for by this Article shall also be available where the designated airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article.

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

APPENDIX G

IN THE SUPREME COURT OF FLORIDA

Wednesday, September 12, 1984

Case No. 63,989

Circuit Court Case No. 83-964 (Leon)

DEPARTMENT OF REVENUE,
Appellant/Cross Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, *et al.*,
Appellee, Cross Appellant.

On consideration of the motion for rehearing filed by attorneys for appellee/cross-appellant, and response thereto,

IT IS ORDERED by the Court that said motion be and the same is hereby denied.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and SHAW, JJ., Concur

C

cc: Hon. Paul F. Hartsfield,
Clerk
Hon. Ben C. Willis,
Chief Judge
David A. Nelson,
Esquire
and N. Fraser Schuh, III,
Esquire
Joseph C. Mellichamp, III,
Esquire
Larry Levy,
Esquire
James E. Tribble,
Esquire

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

By: Debbie Causseaux
Deputy

APPENDIX H

IN THE SUPREME COURT
STATE OF FLORIDA

Case No. 63,989

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellants/Cross Appellees,

v.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees/Cross Appellants.

[Filed Sept. 14, 1984]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Plaintiff/Appellee/Cross Appellant, LINEAS AEREAS COSTARRICENSES, and Intervening Plaintiffs/Appellees/Cross Appellants, TRANSPORTES AEREOS NACIONALES, S.A., AEROLINEAS ARGENTINAS, AERONAVES DE MEXICO, S.A., AEROVIAS NACIONALES DE COLOMBIA, S.A., TRINIDAD AND TOBAGO (BWIA INTERNATIONAL) AIRWAYS CORP., EMPRESA ECUATORIANA DE AVIACION, S.A., COMPANIA MEXICANA DE AVIACION, S.A., DE C.V., VIACAO AEREA RIO-GRANDENSE and VENZOLANA INTERNACIONAL DE AVIACION, S.A., appeal to the Supreme Court of the United States from the Final Decree of the Supreme Court of Florida affirming that portion of the Circuit Court's

Order upholding the Florida tax on aviation fuel as constitutional and reversing that portion of the Circuit Court's Order insofar as it upheld the corporate tax credit to Florida-based airlines and recognized an exemption from the tax for foreign airlines, entered in this action on June 14, 1984, rehearing denied September 12, 1984.

This appeal is taken pursuant to Title 28, United States Code, Section 1257, subparagrah (2).

DATED September 13, 1984.

/s/ N. Fraser Schuh, III
N. FRASER SCHUH, III
SQUIRE, SANDERS & DEMPSEY
Attorneys for Plaintiffs/
Appellees/Cross Appellants
Suite 3000, Miami Center
100 Chopin Plaza
Miami, Florida 33131
Phone—(305) 577-8700

AFFIDAVIT OF SERVICE BY MAIL

STATE OF FLORIDA :
: ss
COUNTY OF DADE :

I, N. FRASER SCHUH, III, depose and say that I am an attorney in the office of Squire, Sanders & Dempsey, attorneys of record for Plaintiffs/Appellees/Cross Appellants, LINEAS AEREAS COSTARRICENSES, S.A., TRANSPORTES AEREOS NACIONALES, S.A., AEROLINEAS ARGENTINAS, AERONAVES DE MEXICO, S.A., AEROVIAS NACIONALES DE COLOMBIA, S.A., TRINIDAD AND TOBAGO (BWIA INTERNATIONAL) AIRWAYS CORP., EMPRESA

ECUATORIANA DE AVIACION, S.A., COMPANIA MEXICANA DE AVIACION, S.A., DE C.V., VIACAO AEREA RIO-GRANDENSE and VENZOLANA INTERNACIONAL DE AVIACION, S.A., and that on September 13, 1984, pursuant to Rule 28, Rules of the Supreme Court, I served a copy of the foregoing Notice of Appeal to the Supreme Court of the United States on each of the parties required to be served herein, as follows:

On Defendant/Appellant/Cross Appellee, STATE OF FLORIDA DEPARTMENT OF REVENUE, by mailing copies in duly addressed envelopes, with first class postage prepaid, to LARRY E. LEVY, ESQ., General Counsel, State of Florida, Department of Revenue, Room 203, Carlton Building, Tallahassee, Florida 32301; and to JOSEPH C. MELLICHAMP, ESQ., Assistant General Counsel, Department of Legal Affairs, The Capital, Tallahassee, Florida 32301.

All parties required to be served have been served.

/s/ N. Fraser Schuh, III
N. FRASER SCHUH, III

SWORN TO AND SUBSCRIBED before me this 13th day of September, 1984.

/s/ [Illegible]
Notary Public

My commission expires:

APPENDIX I

List of the Appellants in this Proceeding
Indicating Their Parent Companies, Subsidiaries
(Except Wholly-Owned Subsidiaries), and Affiliates

AEROLINEAS ARGENTINAS

a. Parent Companies:

Aerolineas Argentinas is owned by the Government of Argentina.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Buenos Aires Catering, S.A.

AERONAVES DE MEXICO, S.A. (AEROMEXICO)

a. Parent Companies:

Aeronaves de Mexico, S.A. is owned by the Government of Mexico.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Cargo Transportation Datatronic, S.A.
2. Empresa Mexicana de Transporte Multimodal, S.A.
3. Telefonos de Mexico, S.A.
4. Transportacion Aerea Mexicana, S.A. de C.V.
5. Turborreactores, S.A. de C.V.

AEROVIAS NACIONALES DE COLOMBIA, S.A. (AVIANCA)

a. Parent Companies:

none

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Sociedad Aeronautica de Medellin Consolidada, S.A. (SAM)
2. Helicopteros Nacionales de Colombia, S.A. (HELICOL)
3. Corporacion de Viajes Ltda. (COVIAJES)
4. Aerocomercio Internacional Ltda.
5. Sociedad Productora y Comercializadora de Alimentos Ltda.

COMPANIA MEXICANA DE AVIACION, S.A. DE C.V. (MEXICANA AIRLINES)

a. Parent Companies:

A majority of the shares of Compania Mexicana de Aviacion, S.A. de C.V. are owned by the Government of Mexico.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Aeropuertos y Terrenos S.A.
2. Cargo Transportation Datatronic S.A.
3. Transportacion Aerea Mexicana, S.A. de C.V.
4. Turborreactores, S.A. de C.V.

EMPRESA ECUATORIANA DE AVIACION (ECUATORIANA)

a. Parent Companies:

Empresa Ecuatoriana de Aviacion is owned by the Government of Ecuador.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

none

LINEAS AEREAS COSTARRICENSES, S.A. (LACSA)

a. Parent Companies:

none

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Hoteles, Restaurantes y Cafeterias de Iberoamerica, S.A.
2. Inversiones Aerolandia, S.A.
3. Pathfinder Tours, Inc.
4. Servicios Aereos Nacionales, S.A.

TRANSPORTES AEREOS NACIONALES, S.A. (TAN AIRLINES)

a. Parent Companies:

none

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Aerovias Nacionales de Honduras, S.A.
2. Budget Rent-a-Car, Honduras
3. Credomatic de Honduras, S.A.
4. Financiera Centroamericana, S.A.
5. General Air Services, Inc.
6. Hoteles de Honduras, S.A.
7. Servicio Aereo de Honduras, S.A.
8. Servicios Tecnicos Especializados

TRINIDAD & TOBAGO AIRWAYS CORPORATION (BWIA INTERNATIONAL AIRLINES)

a. Parent Companies:

Trinidad & Tobago Airways Corporation is owned by the Government of Trinidad & Tobago.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Airline Caterers, Ltd.

VIACAO AEREA RIO-GRANDENSE, S.A. (VARIG)

a. Parent Companies:

Viacao Aerea Rio-Grandense, S.A. is owned by the Government of Brazil.

b. Subsidiaries (Except Wholly-Owned Subsidiaries) and Affiliates:

1. Agripec S.A. Agropecuaria, Industria, Comercio e Exportacao
2. Companhia Tropical de Hoteis
3. Companhia Tropical de Hoteis—Amazonia
4. Companhia Tropical de Hoteis do Nordeste
5. Companhia Tropical—Hotel Santarem
6. Companhia Tropical—Hotel Tambau
7. Expressao Brasileira de Propaganda Ltda.
8. Hotel de Bahia, S.A.
9. Icaro Editora Ltda.
10. RIO-SUL, Servicos Aereos Regionais, S.A.
11. Servicos Auxiliaries de Transporte Aereo, S.A. (SATA)
12. Sociedade Brasileira de Turismo Aereo—"ROTATUR", Ltda.

APPENDIX J

Fla. Stat. Ann. § 212.08(4) (West Supp. 1984)

212.08 Sales, rental, storage, use tax; specified exemptions

The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following tangible personal property are hereby specifically exempt from the tax imposed by this chapter.

* * * *

(4) Exemptions, items bearing other excise taxes, etc.—

(a) Also exempt are:

1. Water (not exempting mineral water or carbonated water).

2. All fuels used by a public or private utility, including any municipal corporation or rural electric cooperative association, in the generation of electric power or energy for sale. Fuel other than motor fuel and special fuel is taxable as provided in this part, with the exception of fuel expressly exempt herein. However, diesel fuel and kerosene used in any tractor, vehicle, or other farm equipment which is used exclusively on a farm or for processing farm products on the farm are taxable as provided in part II. Motor fuels and special fuels are taxable as provided in part II, with the exception of those motor fuels and special fuels used by railroad locomotives or vessels to transport persons or property in interstate or foreign commerce which are taxable under this part only to the extent provided herein. The basis of the tax shall be the ratio of intrastate mileage to interstate or foreign mileage traveled by the carrier during the previous fiscal year of the carrier, such ratio to be determined at the close of the fiscal year of the carrier. This ratio shall be applied each month

to the total purchases made in this state of gasoline and other fuels to establish that portion of the total used and consumed in intrastate movement and subject to tax under this chapter.

(b) Alcoholic beverages and malt beverages are not exempt. The terms "alcoholic beverages" and "malt beverages" as used in this paragraph have the same meanings ascribed to them in ss. 561.01(4) and 563.01, respectively. It is determined by the Legislature that the classification of alcoholic beverages made in this paragraph for the purpose of extending the tax imposed by this chapter is reasonable and just; and it is intended that such tax be separate from, and in addition to, any other tax imposed on alcoholic beverages.

APPENDIX K

Air Transport Services Agreement dated
September 22, 1977 between the
United States of America
and Argentina

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29 U.S.T. 2795, T.I.A.S. No. 8978

F. Business Conditions: The civil aeronautics authorities of each country shall endeavor to ensure that the designated airlines of each country will be able to operate at maximum efficiency. In particular, efforts will be made to provide: 1) for ease and promptness of conversion and remittance; 2) for navigation and communication charges and fuel prices at the lowest practicable levels; 3) for exemption from taxes; and 4) for unrestricted advertising of airlines' services.

* * * *

Extension and Amendment:

March 11, 1981

T.I.A.S. No. 10440

September 9, 1983 and October 13, 1983

Air Transport Services Agreement dated
June 23, 1982 between the
United States of America
and Brazil

IX. BUSINESS CONDITIONS AND COMMERCIAL OPPORTUNITIES

The authorities of each country shall make all possible efforts to ensure that the airlines of each country can operate at maximum efficiency with a fair and equal opportunity to compete for traffic on a non-discriminatory basis. In particular, each government will provide for: 1) fair and equal opportunity to carry commercial traffic without discrimination among airlines; 2) simple procedures for prompt conversion and remittance of currency; 3) airport and airways charges and fuel charges on a non-discriminatory basis; 4) exemption from federal taxes to the maximum extent possible; 5) unrestricted opportunities for advertising and other promotion of all of the services of the designated airlines, and 6) the opportunity for airlines to provide ground handling services for themselves or to contract with a company of their choice for the provision of those services in accordance with national legal requirements.

Extension:

April 20, 1983 and May 2, 1983

Amendment:

June 15, 1984

VII. Business Conditions and Commercial Opportunities

Each Party affirmed its commitment to make all possible efforts to ensure that the airlines of each country can operate at the maximum efficiency with a fair and

equal opportunity to compete for traffic on a non-discriminatory basis. In particular, each government will provide for: 1) fair and equal opportunity to carry commercial traffic without discrimination among airlines; 2) simple procedures for prompt conversion and remittance of currency; 3) airport and airways charges and fuel charges on a non-discriminatory basis; 4) exemption from federal taxes to the maximum extent possible; 5) unrestricted opportunities for advertising and other promotion of all of the services of the airlines; and 6) the opportunity for airlines to provide ground handling services for themselves or to contract with a company of their choice for the provision of those services in accordance with national legal requirements. In addition, the delegations agreed that a designated airline of either Party may notify directly the aeronautical authorities of the other Party of any problems which the airline has encountered regarding discrimination or unfair practices; such notification shall impose an obligation on the aeronautical authorities of that Party to investigate fully such allegations and, if considered substantiated, the aeronautical authorities shall immediately take steps to eliminate the discrimination of unfair practices complained of.

VIII. Fuel Purchases

The delegations of both countries stated that the designated airlines of both countries may purchase local services and fuel in local currency or in freely convertible currencies at the option of the airline. The Brazilian delegation stated that studies are being conducted with a goal of eliminating all additional charges which may occur in the processing of payments for these local services and fuel.

Air Transport Services Agreement dated
October 24, 1956 between the
United States of America
and Colombia

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14 U.S.T. 429, T.I.A.S. No. 5338

ARTICLE 7

In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:

* * * *

(B) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores introduced into the territory of one contracting party by the other contracting party or its nationals, and intended solely for use by aircraft of such contracting party shall be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges.

(C) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores retained on board aircraft of the airlines of one contracting party authorized to operate the routes and services provided for in this Agreement shall, upon arriving in or leaving the territory of the other contracting party, be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges, even though such supplies be used or consumed by such air craft on flights in that territory.

(D) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one contracting party in the territory of the other and used in international services shall be exempt on a basis of reciprocity from

customs duties, excise taxes, inspection fees and other national duties or charges.

Amendment:

October 23, 1968
19 U.S.T. 7501, T:I.A.S. No. 6593

October 16, 1981 and October 22, 1981
T.I.A.S. No. 10404

Air Transport Services Agreement dated
October 20, 1983 and November 23, 1983
between the United States of America
and Costa Rica

ARTICLE 9

Customs Duties and Taxes

(1) On arriving in the territory of one Party, aircraft operated in international air transportation by the designated airlines of the other Party, their regular equipment, ground equipment, fuel, lubricants, consumable technical supplies, spare parts, including engines, aircraft stores (including but not limited to such items as food, beverages and liquor, tobacco and other products destined for sale to or use by pasengers in limited quantities during the flight), and other items intended for or used solely in connection with the operation or servicing of aircraft engaged in international air transportation shall be exempt, on the basis of reciprocity, from all import restrictions, property taxes and capital levies, customs duties, excise taxes, and similar fees and charges imposed by the national authorities, and not based on the cost of services provided, provided such equipment and supplies remain on board the aircraft.

(2) There shall also be exempt, on the basis of reciprocity, from the taxes, duties, fees and charges referred to in paragraph (1) of this Article, with the exception of charges based on the cost of the service provided:

(a) aircraft stores introduced into or supplied in the territory of a Party and taken on board, within reasonable limits, for use on outbound aircraft of a designated airline of the other Party engaged in international air transportation, even when these stores are to be used on a part of the journey performed over the territory of the Party in which they are taken on board;

(b) ground equipment and spare parts including engines introduced into the territory of a Party for the servicing, maintenance or repair of aircraft of a designated airline of the other Party used in international air transportation; and

(c) fuel, lubricants and consumable technical supplies introduced into or supplied in the territory of a Party for use in an aircraft of a designated airline of the other Party engaged in international air transportation, even when these supplies are to be used on a part of the journey performed over the territory of the Party in which they are taken on board.

(3) Equipment and supplies referred to in paragraphs (1) and (2) of this Article may be required to be kept under the supervision or control of the appropriate authorities.

(4) The exemptions provided for by this Article shall also be available where the designated airlines of one Party have contracted with another airline, which similarly enjoys such exemptions from the other Party, for the loan or transfer in the territory of the other Party of the items specified in paragraphs (1) and (2) of this Article.

(5) Each Party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs (1) and (2) of this Article, as well as from fuel through-put charges, in the circumstances described in this Article, except to the extent that the charges are based on the actual cost of providing the service.

Air Transport Services Agreement dated
January 8, 1947 between the
United States of America
and Ecuador

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61 Stat. 2773, T.I.A.S. No. 1606

ARTICLE 3

In order to prevent discriminatory practices and to assure equality of treatment, both contracting parties agree that:

* * * *

(b) Fuel, lubricating oils, and spare parts introduced into the territory of one contracting party by the other contracting party or its nationals, and intended solely for use by aircraft of the airlines of such contracting party shall, with respect to the imposition of customs duties, inspection fees or other national duties or charges by the contracting party whose territory is entered, be accorded the same treatment as that applying to national airlines and to airlines of the most-favored-nation.

(c) The fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board civil aircraft of the airlines of one contracting party authorized to operate the routes and services described in the Annex shall, upon arriving in or leaving the territory of the other contracting party, be exempt from customs, inspection fees or similar duties or charges, even though such supplies be used or consumed by such aircraft on flights in that territory.

Amendment:

January 3, 1951 and January 10, 1951
2 U.S.T. 482, T.I.A.S. No. 2196

Supplement:

December 31, 1975
T.I.A.S. No. 8205

Air Transport Services Agreement dated
August 15, 1960 between the
United States of America
and Mexico

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12 U.S.T. 60, T.I.A.S. No. 4675

ARTICLE 7

In order to prevent discriminatory practices and to assure equality of treatment, both parties agree further to observe the following principles:

* * * *

(b) Fuel, lubricating oils, consumable technical supplies, spare parts, regular equipment, and stores introduced into the territory of one party by the other party or its nationals, and intended solely for use by aircraft of such party shall be exempt on a basis of reciprocity from custom duties, inspection fees and other national duties or charges.

(c) Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores retained on board aircraft of the airlines of one party authorized to operate the routes and services provided for in this Agreement shall, upon arriving in or leaving the territory of the other party, be exempt on a basis of reciprocity from customs duties, inspection fees and other national duties or charges, even though such supplies be used or consumed by such aircraft on flights in that territory.

(d) Fuel, lubricating oils, other consumable technical supplies, spare parts, regular equipment, and stores taken on board aircraft of the airlines of one party in the territory of the other and use in international services shall be exempt on a basis of reciprocity from customs duties,

excise taxes, inspection fees and other national duties or charges.

Extension and Amendment:

July 31, 1970
22 U.S.T. 1492, T.I.A.S. No. 7167

January 20, 1978
Department of State Press Release No. 63,
February 7, 1978

December 13, 1983 and December 16, 1983

Air Transport Services Agreement dated
February 11, 1946 between the
United States of America
and the United Kingdom

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60 Stat. 1499, T.I.A.S. No. 1507

ARTICLE 3

* * * *

(2) Fuel, lubricating oils and spare parts introduced into, or taken on board aircraft in, the territory of one Contracting Party by, or on behalf of, a designated air carrier of the other Contracting Party and intended solely for use by the aircraft of such carrier shall be accorded, with respect to customs duties, inspection fees or other charges imposed by the former Contracting Party, treatment not less favourable than that granted to national air carriers engaged in international air services or such carriers of the most favoured nation.

(3) Supplies of fuel, lubricating oils, spare parts, regular equipment and aircraft stores retained on board aircraft of a designated air carrier of one Contracting Party shall be exempt in the territory of the other Contracting Party from customs duties, inspection fees or similar duties or charges, even though such supplies be used by such aircraft on flights within that territory.

Agreement dated November 22, 1961 between the United States of America and the United Kingdom providing for air routes between the West Indies and the United States, operations over which will be in accordance

with the provisions of the agreement of February 11, 1946

13 U.S.T. 171, T.I.A.S. No. 4955

Agreement dated September 22, 1962 and October 8, 1962 between the United States of America and Trinidad and Tobago to continue application of certain agreements to scheduled services between the United States and the Caribbean area by United States and Trinidad and Tobago Airlines

13 U.S.T. 2463, T.I.A.S. No. 5209

APPENDIX L

Letter dated September 29, 1982 to Executive Director of State of Florida Department of Revenue from Deputy Assistant Secretary of State for Transportation and Telecommunications

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[SEAL]

United States Department of State
Washington, D.C. 20520
September 29, 1982

Mr. Randy Miller
Director
Department of Revenue
102 Carlton Building
Calhoun Street
Talahassee, Florida 32301

Dear Mr. Miller:

The Department of State is seeking your cooperation in an important matter affecting U.S. international relations.

The U.S. Government exempts foreign airlines from customs duties, taxes, fees and other national charges on their aircraft, fuel, and aviation related materials. These exemptions include such items as lubricants, consumable technical supplies, spare parts (including engines) and aircraft stores (including food, beverages and tobacco). The United States obligation to accord these exemptions stems from our adherence to Article 24 of the International Convention on Civil Aviation (Chicago, 1944) and to the air transport agreements which the United States has with over 70 foreign countries. In some cases, such as the absence of a bilateral aviation agreement, exemptions are accorded foreign airlines pursuant to a finding of reciprocity.

Governments of a number of countries have recently brought to our attention that their airlines are required to pay state and local taxes on items for which the U.S. Government grants an exemption from federal taxes. Some foreign governments have questioned the appropriateness of imposing these state and local taxes on foreign air carriers in view of the generally-accepted and long-standing international practice of reciprocally exempting such items from taxes. A few such governments have raised the possibility that state and local authorities in their jurisdictions could impose similar taxes on U.S. airlines. A proliferation of state and local taxes would frustrate the international system of reciprocal tax exemptions and thereby significantly increase the cost of international air transportation.

We urge, therefore, that you exempt foreign air carriers from taxes levied in your jurisdiction on items for which the U.S. Government provides an exemption. To ensure that U.S. airlines enjoy reciprocal treatment abroad, we recommend that you grant such exemptions only to foreign airlines which demonstrate that state and local authorities in their country exempt U.S. airlines from taxes.

In order to respond to foreign government inquiries, we would appreciate knowing precisely what state and local charges you currently levy on foreign airlines. Such information would be particularly helpful if you would indicate whether the charges are indeed taxes or whether they are fees for services rendered. Information concerning actual and proposed exemptions for foreign airlines would also be useful.

We appreciate your assistance and cooperation in this matter.

Sincerely,

MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and
Telecommunication

cc: Mr. Grover C. Jones
Chief, Bureau of Aviation
Florida Dept. of Transportation
605 Suwannee St.
Mail Station 46
Talahassee, Florida 32301

Mr. Richard Judy
Director
Miami International Airport
Box 59-2075, AMF
Miami, Florida

Letter dated October 25, 1982 to
Deputy Assistant Secretary of State for
Transportation and Telecommunications
from Executive Director of State of
Florida Department of Revenue

STATE OF FLORIDA
DEPARTMENT OF REVENUE
Tallahassee, 32301

[SEAL]

Randy Miller
Executive Director

October 25, 1982

Mr. Matthew V. Scocozza
Deputy Assistant Secretary
for Transportation and Telecommunication
United States Department of State
Washington, D. C. 20520

Dear Mr. Scocozza:

This will answer your letter of September 29 regarding taxation of foreign airlines.

The State of Florida recognized the importance of foreign airlines (and steamships) many years ago, and in spite of increased tax rates and bases over the years, the generous tax advantages allowed them have not changed.

Examples of these tax advantages are:

1. They are totally exempt from the state 8¢ motor fuel tax (the same as domestic commercial airlines) on all fuel placed aboard the aircraft.

2. The state's sales and use tax applies only to the ratio of miles flown in Florida to total system

miles. The very short distance out of Miami, Ft. Lauderdale, Tampa and Jacksonville is so minute, and since we must recognize any tax properly imposed by another state or taxing jurisdiction, the result is that practically no Florida sales and use tax is realized from foreign carriers on their purchases of aircraft, parts, fuel, certain ground and loading equipment, etc.

This letter relates to state imposed taxes only. Any taxes and/or fees imposed by local taxing authorities are something we have very little knowledge of and no control over.

We are taking the liberty of forwarding a copy of your letter to Governor Bob Graham for review by his policy issue staff, and if there is some particular issue not covered in this response, please let us hear from you again.

Sincerely,

/s/ Randy Miller
RANDY MILLER
Executive Director

RM/vam

cc: Honorable Bob Graham
Mr. Grover C. Jones
Mr. Richard Judy

Letter dated March 17, 1982 [1983] to
Executive Director of State of Florida
Department of Revenue from
Deputy Assistant Secretary of State for
Transportation and Telecommunications

[SEAL]

DEPARTMENT OF STATE
Washington, D.C. 20520

Mr. Randy Miller
Executive Director
Department of Revenue
State of Florida
Tallahassee, Fla. 23201

March 17, 1982

Dear Mr. Miller:

I am writing to you to express the Department of State's concern regarding the recent enactment of a state tax on aviation fuel. In your letter to me of October 25, 1982, you indicated that the State of Florida ". . . recognized the importance of foreign airlines many years ago . . . and that the generous tax advantages allowed them have not changed."

Therefore, we were surprised and distressed to hear that the State of Florida plans to impose a 5% tax on aviation fuel, effective April 1, 1983. I understand the tax is to be applied to all aviation fuel sold and not only to fuel consumed in Florida, as had previously been the case. If imposed, this tax will cause serious foreign relations problems unless provision is made to exclude foreign airlines. It may be possible, for example, to provide for an exemption based on reciprocity whereby foreign airlines would be exempted from the tax if U.S. airlines operating to the foreign airline's home country are also exempted from similar taxes.

We would appreciate any further information you can give us concerning this new tax and for your comments on my suggestion to avoid the foreign relations difficulties.

Sincerely,

/s/ Matthew V. Scocozza
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and
Telecommunication

Letter of August 30, 1983 to Clerk of Florida Supreme Court transmitting Motion of Appellees to Supplement Record and Appellee's Post-Argument Exhibit A

SQUIRE, SANDERS & DEMPSEY
Cleveland

August 30, 1983

(216) 687-8585

Hon. Sid J. White
Clerk
Supreme Court of Florida
Tallahassee, Florida 32301

Re: Department of Revenue v.
Lineas Aereas Costarricenses, S.A., et al.
Case No. 63,989

Dear Mr. White:

After today's argument, I learned that the Department of State had been expecting me to bring the Department's latest message to the attention of the Court.

To that end, I enclose the original and several copies of a Motion to Supplement the Record; I trust you will find the Motion in order for filing.

Also enclosed, as "Appellees' Post-Argument Exhibit A" are copies of the wire Mr. Papkin and I received this morning from the Department of State. I assume the wire should be lodged with your office pending the Court's ruling on the Motion to Supplement.

Very truly yours,

/s/ D.A.N.
DAVID A. NELSON

IN THE SUPREME COURT OF FLORIDA

Case No. 63,989

DEPARTMENT OF REVENUE,
Appellant, Cross-Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees, Cross-Appellants.

MOTION OF APPELLEES TO SUPPLEMENT RECORD

Appellees ("the Foreign Airlines") respectfully move the Court, pursuant to Rules 9.200(f) and 9.300 of the Florida Rules of Appellate Procedure, for leave to supplement the record by filing with the Court a telegram (copies of which, marked Appellees' Post-Argument Exhibit A, have been lodged with the Clerk) dated August 30, 1983, to Squire, Sanders & Dempsey from Hon. Matthew V. Scocozza, Deputy Assistant Secretary of State for Transportation and Telecommunications, United States Department of State.

In support of this Motion, Appellees would show this Court the following:

1. The telegram amplifies two previous letters from Mr. Scocozza that were received in evidence as part of Plaintiffs' Exhibit 6 (R 373-74) and comprise part of the record on appeal. (Copies of the earlier letters are attached). The telegram is written "on behalf of the aviation authorities of the United States"—the Civil Aeronautics Board and the Department of Transportation, as well as the Department of State—and further illuminates the national policy alluded to in the briefs and oral argument.

2. "The views of the State Department carry substantial weight in these matters. . . ." *United States v. Postal*, 589 F.2d 862, 883 (5th Cir. 1979). While the form in which the Department has presented its views here may be somewhat unorthodox, appellees urge this Court to let the Department's communication be received for whatever it may be worth.

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY
Attorneys for Appellees/Cross-Appellants

By _____

DAVID A. NELSON
One Biscayne Tower
Two South Biscayne Boulevard
Suite 3684
Miami, Florida 33131
(305) 577-8700

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been delivered to the office of Joseph C. Mellichamp, III, Assistant Attorney General, Department of Legal Affairs, LL04, the Capitol, Tallahassee, Florida, and the office of Larry Levy, General Counsel, Department of Revenue, State of Florida, 203 Carlton Building, Tallahassee, Florida 32301, and has been mailed to James E. Tribble, Blackwell, Walker, Gray, Powers, Flick & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, this 30th day of August, 1983.

DAVID A. NELSON
Attorney for Appellees/Cross-Appellants

Appellees' Post-Argument Exhibit A—Telegram dated August 30, 1983 from Deputy Assistant Secretary of State for Transportation and Telecommunications to Squire, Sanders & Dempsey

---

[LOGO] TELEGRAM
WESTERN UNION

THA007(0805)(4-002043M242)PD 08/30/83 0801
ICS IFLDOSA WSH
2403 UG WASHDC
PMS SQUIRE, SANDERS AND DEMPSEY (URGENT DELIVERY REQUESTED)
C/O TALLAHASSEE HILTON
101 SOUTH ADAMS STREET
TALLAHASSEE FLA 32302

ATTN: SQUIRE SANDERS AND DEMPSEY, MR. ROBERT PAPKIN

DEAR MR. PAPKIN:

I AM WRITING ON BEHALF OF THE AVIATION AUTHORITIES OF THE UNITED STATES—THE DEPARTMENT OF STATE, THE CIVIL AERONAUTICS BOARD AND THE DEPARTMENT OF TRANSPORTATION—WITH RESPECT TO THE APPEAL IN STATE OF FLORIDA, DEPARTMENT OF REVENUE V. LINEAS AEREAS COSTARRICENSES, S.A., ET AL., CASE NO. 63,989, WHICH I UNDERSTAND IS PENDING BEFORE THE SUPREME COURT OF THE STATE OF FLORIDA. AS YOU WILL BE AWARE FROM THE RECORD OF THE APPEAL, I HAVE TWICE WRITTEN TO THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA TO EXPLAIN HOW THE POLICIES AND INTERESTS OF

THE UNITED STATES ARE AFFECTED BY STATE AND LOCAL TAXATION OF INTERNATIONAL AIR CARRIERS. THOSE LETTERS HAVE BEEN INTRODUCED INTO THE RECORD OF THIS PROCEEDING AND WERE RELIED UPON IN THE TRIAL COURT S FINAL JUDGMENT (AS AMENDED). THE POSITIONS EXPRESSED IN THOSE LETTERS CONTINUE TO REFLECT THE POLICIES OF THE U.S. AVIATION

THE UNITED STATES IS COMMITTED—BY STATUTE, INTERNATIONAL AGREEMENT AND EXPRESS POLICY—TO A MARKETPLACE FOR INTERNATIONAL AVIATION GOVERNED, TO THE GREATEST EXTENT POSSIBLE, BY COMPETITIVE FORCES UNALTERED BY GOVERNMENTAL INTERVENTION. FOREIGN TAXATION OF AIR CARRIERS THREATENS AN EXCESSIVE TAX BURDEN ON INTERNATIONAL TRANSPORTATION AND RESTRICTED ACCESS TO THE MARKETPLACE; IT MAY ALSO UNDERMINE THE EVENHANDEDNESS REQUISITE TO FAIR COMPETITION IN THE MARKETPLACE. THEREFORE, THE FEDERAL GOVERNMENT HAS PARTICIPATED IN AND IS CONTINUING TO ENCOURAGE A GROWING INTERNATIONAL CONSENSUS TO PROMOTE INTERNATIONAL AIR SERVICES THROUGH RECIPROCAL EXEMPTION OF AIR CARRIERS FROM FOREIGN TAXES. AS PART OF THIS POLICY, THE U.S. ENCOURAGES THE STATES TO EXEMPT FOREIGN AIR CARRIERS FROM ALL TAXES, IN PARTICULAR TO AVOID RETALIATION BY FOREIGN GOVERNMENTS AGAINST ALL U.S. CARRIERS IN RESPONSE TO THE TAX POLICY OF ONLY ONE STATE. SENATE BILL NO. 8-A CONFLICTS WITH THIS FEDERAL POLICY AND THE LONG-ACCEPTED INTERNATIONAL PRACTICE IT REFLECTS.

FURTHER, AS I UNDERSTAND SENATE BILL NO. 8-A, IT IS SPECIFICALLY INTENDED TO PROVIDE A COMPETITIVE ADVANTAGE TO QUALIFIED U.S. AIR CARRIERS DOMICILED IN THE STATE OF FLORIDA. IN OUR VIEW, THIS OBJECTIVE IS INCONSISTENT WITH THE POLICY REFLECTED IN ALL RELEVANT BILATERAL CIVIL AVIATION AGREEMENTS TO PROVIDE A "FAIR AND EQUAL OPPORTUNITY TO COMPETE."

VERY TRULY YOURS,

MATTHEW V. SCOCOZZA
DEPUTY ASSISTANT SECRETARY FOR
TRANSPORTATION AND TELECOMMUNICATIONS
DEPARTMENT OF STATE WASHINGTON DC 246266

IN THE SUPREME COURT OF FLORIDA

Case No. 63,989

DEPARTMENT OF REVENUE,
Appellant, Cross-Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees, Cross-Appellants.

RESPONSE AND MOTION TO STRIKE

Comes now the Appellant, DEPARTMENT OF REVENUE, in response to the Motion of Appellees to Supplement Record and says:

MOTION TO STRIKE

Appellant moves to Strike said Motion for the following reasons:

1. Said motion and the telegram is a *blatant* and *flagrant* violation of the integrity of this Court and the appellate process. The Appellees are attempting to introduce hearsay of the "rankest kind". The telegram is obviously an attempt by the Appellees to "bloat" the record with no opportunity whatsoever for cross examination by the Appellant. The "timing" of this telegram demonstrates quite clearly that the faceless federal bureaucrat offering same was "prompted", probably by Appellees. The motive of the writer and the circumstances which gave rise to such telegram at this precise moment in time cannot be inquired into, which reason alone is sufficient to grant the Motion to Strike.

2. As the Court will recall, Mr. David A. Nelson, Counsel for the Appellees, attempted to discuss this telegram with the Court at the conclusion of his presentation by referring to it as a "procedural" matter. The Court did not accept the telegram then and it should certainly not accept it now. Mr. Nelson is attempting to accomplish indirectly that which he could not accomplish directly; which is to place a telegram signed by an individual federal bureaucrat in the State Department in this Court and suggest by implication to this Court that such is the view of the United States Government, even though the United States has not chosen to petition this Court or the lower Courts for permission to appear either as an Intervenor or as an Amicus.

3. The rule which has existed in this Court, and in all judicial tribunals (presumably even in the jurisdiction where Mr. David A. Nelson practices law) is that evidence may not be submitted at the appellate level and an appellate court may not consider evidentiary matters not presented and made a part of the record at the trial level. The testimony found in such telegram, and, in fact, the Motion itself, is frivolous, scandalous, and impertinent, prejudicing both the Department and this Court by denying the right of cross examination of this Washington faceless federal bureaucrat.

ACCORDINGLY, the Motion should be stricken and attorney's fees should be awarded to the Appellant.

RESPONSE

1. The Appellant readopts all statements contained in its Motion to Strike previously stated herein.

2. It should be noted that the telegram is written to Mr. Papkin who was present with Mr. Nelson in the Courtroom during oral argument Tuesday, August 30, 1983. It is *not* a petition filed with the Court on behalf of the Secretary of State as Mr. Nelson indicated during oral argument, and as he infers in his Motion.

Furthermore, the telegram is a *reiteration* of exactly what Mr. Nelson has argued in his brief. (Appropriate cross examination might well reveal some input and assistance from the Appellees or counsel for same in the wording and preparation, not to mention *timing*, of said telegram).

4. The wording of the telegram indicates quite clearly that Matthew V. Scocozza, the "apparent" author, is relying on an "understanding" of Senate Bill 8-A provided to him from someone else, presumably Mr. Papkin or someone representing the Appellees. He states therein:

> "Further, as I understand Senate Bill No. 8-A, it is specifically intended to provide a competitive advantage to qualified U.S. Air Carriers domiciled in the State of Florida. In our view, this objective is inconsistent with the policy reflected in all relevant bilateral civil aviation agreements to provide a "fair and equal opportunity to compete."

As pointed out in the Appellant's briefs, no competitive advantage exists because both foreign airlines and domestic airlines competing over the same routes would pay the identical tax on the purchase of special fuel purchased in the State of Florida. Domestic airlines, which are required to pay corporate income tax (no foreign airline pays or ever has paid Florida corporate income tax—see Record in this case and the *Air Jamaica* case) and both the foreign and domestic airlines pay the identical special fuel tax varying only because of the number of gallons purchased.

Since no right of cross examination exists, one can only *ponder* what Mr. Scocozza's answer would be if presented with the accurate facts. This is precisely the reason for the rule that evidence and testimony not considered by the trial court cannot be considered by the appellate court.

In fact, under Judge Willis' ruling, it is the foreign airlines competing with the United States airlines over the same routes which would have the competitive advantage and be exempt from the state excise tax, but perhaps that is what Mr. Scocozza actually seeks.

WHEREFORE, the Appellant moves the Court to enter an Order striking the Motion and the telegram and awarding attorney's fees to the Appellant.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing Response and Motion to Strike has been sent by U.S. Mail to David A. Nelson, One Biscayne Tower, Two South Biscayne Boulevard, Suite 3684, Miami, Florida 33131; to James E. Tribble, Blackwell, Walker, Gray, Powers, Flick & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, this 1st day of September, 1983.

Respectfully submitted,

JIM SMITH
Attorney General

/s/ J. C. Mellichamp, III
JOSEPH C. MELLICHAMP, III
Assistant Attorney General
Department of Legal Affairs
LL04 The Capitol
Tallahassee, Florida 32301
(904) 487-2142

/s/ Larry Levy
LARRY LEVY
General Counsel
Department of Revenue
203 Carlton Building
Tallahassee, Florida 32301
(904) 488-0712

Letter dated September 7, 1983 to Clerk, Florida Supreme Court transmitting ribbon copy of letter dated August 30, 1983 from Deputy Assistant Secretary of State for Transportation and Telecommunications to counsel for State, the Appellees, and the Amicus

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SQUIRE, SANDERS & DEMPSEY
Cleveland

(216) 687-8585

September 7, 1983

VIA EXPRESS MAIL

Hon. Sid J. White
Clerk
Supreme Court of Florida
Tallahassee, Florida 32301

Re: Department of Revenue v. Lineas Aereas Costarricenses, S.A., et al.
Case No. 63,989

Dear Mr. White:

I am now in receipt of the ribbon copy of a letter from the U.S. State Department confirming (and, in minor degree, correcting) the text of the wire lodged with your office at the end of last month. I enclose the original and seven copies herewith, in the thought that they should probably be used in lieu of or in addition to the wire you are now holding if the Court grants the foreign airlines' pending motion to supplement the record.

Very truly yours,

/s/
DAVID A. NELSON

Ribbon copy of letter dated August 20, 1983 from Deputy Assistant Secretary of State for Transportation and Telecommunications to counsel for State, the Appellees, and the Amicus

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[SEAL]

United States Department of State
Washington, D.C. 20520
August 30, 1983

[Filed Sep. 8, 1983]

Mr. Robert Papkin
Squire, Sanders & Dempsey
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Mr. James E. Tribble
Blackwell, Walker, Grey, Powers, Flick & Hoehl
2400 Amerifirst Building
Southeast Third Avenue
Miami, Florida 33131

Mr. Jim Smith, Attorney General
Attn: Joseph Mellichamp, III
Assistant Attorney General
Department of Legal Affairs
The Capitol, 11-04
Tallahassee, Florida 32301

Mr. Larry Levy
General Counsel
Department of Revenue
State of Florida
Carlton Building, Room 203
Tallahassee, Florida 32301

Gentlemen:

I am writing on behalf of the aviation authorities of the United States—the Department of State, the Civil

Aeronautics Board and the Department of Transportation—with respect to the appeal in *State of Florida, Department of Revenue v. Lineas Aereas Costarricenses, S.A., et al.*, Case No. 63,989, which I understand is pending before the Supreme Court of the State of Florida. As you will be aware from the record of the trial, I have twice written to the Department of Revenue of the State of Florida to explain how the policies and interests of the United States are affected by state and local taxation of international air carriers. Those letters have been introduced into the record of this proceeding and were relied upon in the trial court's Final Judgment (as amended). The positions expressed in those letters continue to reflect the policies of the U.S. aviation authorities.

The United States is committed—by statute, international agreement and express policy—to a marketplace for international aviation governed, to the greatest extent possible, by competitive forces unaltered by governmental intervention. Foreign taxation of air carriers threatens an excessive tax burden on international transportation and restricted access to the marketplace; it may also undermine the evenhandedness requisite to fair competition in the marketplace. Therefore, the federal government has participated in and is continuing to encourage a growing international consensus to promote international air services through reciprocal exemption of air carriers from foreign taxes. As part of this policy, the U.S. encourages the States to exempt foreign air carriers from all taxes, in particular to avoid retaliation by foreign governments against all U.S. carriers in response to the tax policy of only one State. Senate Bill No. 8-A conflicts with this federal policy and the long-accepted international practice it reflects.

Further, as I understand Senate Bill No. 8-A, it is specifically intended to provide a competitive advantage to qualified U.S. air carriers domiciled in the State of

Florida. In our view, this objective is inconsistent with the policy reflected in all relevant bilateral civil aviation agreements to provide a "fair and equal opportunity to compete."

Very truly yours,

/s/ Matthew V. Scocozza
MATTHEW V. SCOCOZZA
Deputy Assistant Secretary
for Transportation and
Telecommunications

Letter dated September 8, 1983 from
Clerk, Florida Supreme Court to
Counsel for Appellees

SID J. WHITE, Clerk
SUPREME COURT OF FLORIDA
Supreme Court Building
Tallahassee 32301

September 8, 1983

Case No. 63,989

RE: DEPT OF REVENUE

v.

LINEAS AEREAS COSTARRICENSES, S.A.

David A. Nelson, Esq.
1800 Huntington Building
Cleveland, Ohio 44115

I have this date received the below-listed pleadings or documents:

> The enclosures you attached with your letter of September 7, 1983, are being returned as the Court denied the Motion of Appellees to Supplement Record.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

/s/ Sid J. White
Clerk
Supreme Court

SJW/pb

cc: Hon. Matthew V. Scocozza
Larry Levy, Esquire
Joseph C. Mellichamp, III, Esquire
James E. Tribble, Esquire

IN THE SUPREME COURT OF FLORIDA

Case No. 63,989

DEPARTMENT OF REVENUE,
Appellant, Cross-Appellee,

vs.

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellees, Cross-Appellants.

APPELLEES' BRIEF IN OPPOSITION TO MOTION TO STRIKE

We do not want to make a mountain out of a molehill, but the Department of Revenue's motion to strike clearly merits a response.

The Department appears to be laboring under a misapprehension as to what has actually been filed with this Court. The telegram from the Department of State was *not* attached to appellees' August 31 motion. The text of the telegram was *not* quoted in the motion. (Neither was it quoted in oral argument; on the contrary, as the Court will recall, counsel scrupulously *refrained* from quoting the telegram and noted that it would be improper to read from it without the telegram having been made part of the record.)

All that has been placed before this Court so far—aside from a passage that the Department of Revenue itself has seen fit to quote from the telegram—is a short and straightforward motion asking for leave to supplement the record. If there is any jurisdiction in the land where the mere filing of such a motion is considered

"a . . . violation of the [Court's] integrity," we are unaware of it.

The motion to supplement is perfectly proper from a procedural standpoint; to strike the motion would be absurd. To deny it, we submit, would be wrong.

The notion that we are attempting to bloat the record with "hearsay" simply will not wash. That the U.S. Department of State has a definite view to express on the challenged tax happens to be a fact. The expression of that view no more constitutes "hearsay" than does the expression of the International Air Transport Association's view in the amicus curiae brief this Court has already received from that body.

The existence of the State Department's August 30 telegram is a fact, just as the existence of its earlier letters to the Department of Revenue is a fact. The earlier letters (copies of which, for ease of reference, are attached to the motion to supplement) were offered in evidence at the trial. R 373. The Department of Revenue objected to their admission on grounds of relevance and materiality, but certainly did not claim they were "hearsay." R 374. Judge Willis overruled the objection and allowed the letters to be received. *Id.*

Even if the State Department's letters did constitute hearsay, they would still be admissible as "public records and reports" under Fla. Ev. Code § 90.803(8). The letters are obviously "statements reduced to writing . . . of public offices or agencies," within the meaning of those terms as used in the Evidence Code, and the Department of Revenue can hardly deny that the letters relate to "matters which there was a duty to report . . . ." That duty is imposed, of course, by the bilateral aviation agreements themselves. Under the bilateral agreements, as the Department of Revenue acknowledges, the United States has undertaken to use its best efforts to secure exemption of the foreign airlines from state and local taxes. The

State Department is morally and legally bound to oppose the tax at issue here, and this Court may find, if it chooses to receive the latest communication, that the State Department has in no way shirked its duty.

It is true, of course, that the State Department's telegram was not "presented and made a part of the record at the trial level." It couldn't have been, because it didn't exist then. We would have offered the telegram at the time of trial had we been able to, and surely there can be no doubt that Judge Willis would have admitted the telegram, just as he admitted the State Department's letters. He would have been correct in doing so. A trial is supposed to be a search for truth, after all, and "[w]hatever evidence is offered which will assist in knowing which party speaks the truth of the issues in an action is relevant, and, when to admit it, does not override other formal rules of evidence, it should be received." *McBrayer v. State*, 112 Fla. 415, 150 So. 736, 737 (1933).

The motion to strike should be denied.

Respectfully submitted,

SQUIRE, SANDERS & DEMPSEY

By: _____

DAVID A. NELSON
One Biscayne Tower
Two South Biscayne Boulevard
Suite 3684
Miami, Florida 33131
(305) 577-8700
Attorneys for Appellees

CERTIFICATE OF SERVICE

True and correct copies of the foregoing Brief in Opposition to Motion to Strike have been sent by U.S. mail to Joseph C. Mellichamp, III, Assistant Attorney General, Department of Legal Affairs, LL04, The Capitol, Tallahassee, Florida; Larry Levy, General Counsel, Department of Revenue, State of Florida, 203 Carlton Building, Tallahassee, Florida 32301; and James E. Tribble, Blackwell, Walker, Gray, Powers, Flock & Hoehl, 2400 AmeriFirst Building, One Southeast Third Avenue, Miami, Florida 33131, this 9th day of September, 1983.

/s/ David A. Nelson
DAVID A. NELSON
Attorney for Appellees